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Submitted
Justice Clifford

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 331.

JOHN GUT, PLAINTIFF IN ERROR,

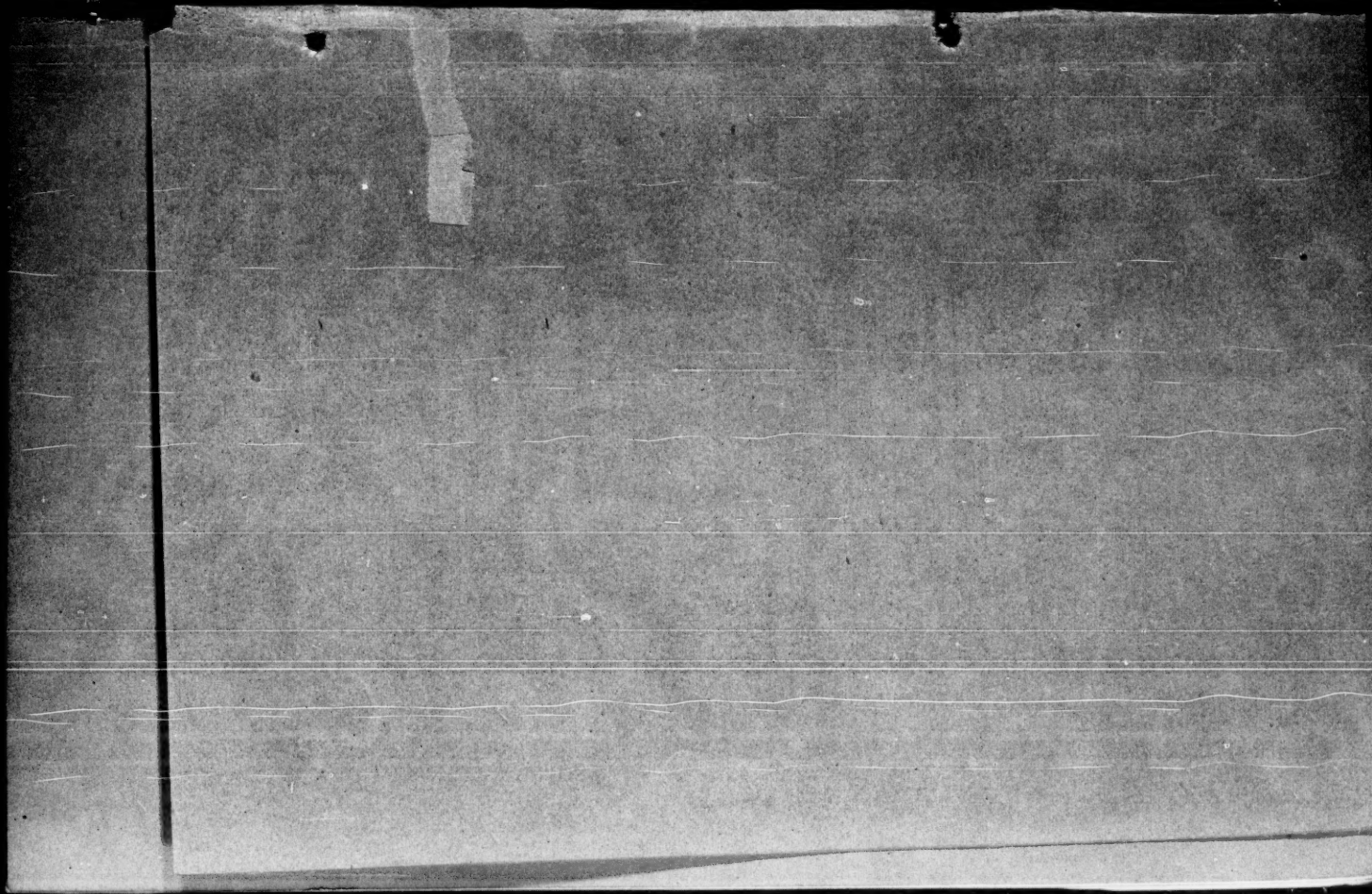
vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED DECEMBER 7, 1869.

Jas Burns
Jas Lusk



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1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Minnesota before you, between John Gut and the said State of Minnesota, a manifest error hath happened to the great damage of the said John Gut, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
2 to be done therein to correct that error what of right, and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 26th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States the ninety-third.

[SEAL] H. E. MANN,
Clerk U. S. Circuit Court Dist. Minn'a.

Allowed by—

THOMAS WILSON,
Chief Justice of the Supreme Court of the State of Minnesota.

(Indorsed:) 1014. Supreme Court of the U. S. John Gut, pl'ff in error, vs. the State of Minnesota, def't in error. Writ of error.

Filed April 5th, 1869.

SHERWOOD HOUGH, *Clerk.*

STATE OF MINNESOTA, *Supreme Court, ss:*

To the honorable the Chief Justice & associate justices of the Supreme Court of the United States:

Answer of the justices of the supreme court of the State of Minnesota, as commanded in the within writ.

Dated St. Paul, Minn., August 19th, 1869.

[SEAL.] SHERWOOD HOUGH,
Clerk Sup. C't Minnesota.

3 UNITED STATES OF AMERICA, *ss:*

To the State of Minnesota, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein John Gut is plaintiff, and the said State is defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Wilson, chief justice of the supreme court of the State of Minnesota, this 5th day of April, in the year of our Lord 1869.

[SEAL.] THOMAS WILSON,
Chief Justice of the Supreme Court of the State of Minnesota.

4 STATE OF MINNESOTA, *County of Hennepin, ss:*

Charles E. Flandrau, being duly sworn, deposes and says that on the thirteenth day of April, 1869, at the city of Minneapolis, in the county of Hennepin, and State of Minnesota, he served the annexed citation on Francis R. E. Cornell, esq., attorney general of the State of Minnesota, by handing to and leaving with said Frances R. E. Cornell a true copy of the same, and exhibiting to said Cornell the original; and deponent further says that he well knows the person upon whom he served the said citation as aforesaid to be the attorney general of the State of Minnesota.

CHARLES E. FLANDRAU.

Sworn before me this 7th day of May, 1869.

BUDD REESE,
U. S. Commissioner, Minnesota.

5 STATE OF MINNESOTA, *County of Ramsey, ss:*

Greenleaf Clark, being duly sworn, doth depose and say, that on the first day of May, A. D. 1869, at the city of St. Paul, in the county of Ramsey, and State of Minnesota, he served the annexed citation on his excellency Governor William R. Marshall, governor of the State of Minnesota, by handing to and leaving with said William R. Marshall, governor as aforesaid, a true and correct copy of the same, and exhibiting to said Marshall the original; and deponent further says that he well knows the person upon whom he served the said citation as aforesaid to be the governor of the State of Minnesota.

GREENLEAF CLARK,

Sworn before me this 3d day of May, A. D. 1869.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court District Minnesota.

(Endorsed as follows:) Citation. Filed May 10th, 1869.
SHERWOOD HOUGH, *Clerk.*

6 *Challenge to grand jury.*

The State of Minnesota, counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, district court, 6th judicial district, June term, A. D. 1867, held at the court-room in the village of Redwood Falls, in the co. of Redwood, in the State of Minnesota. First day of the term, June 18th, 1867, the Hon. Horace Austin, judge, presiding.

THE STATE OF MINNESOTA *against* JOHN GUT. } Motion.

John M. Dorman, counsel for John Gut, made a motion to set aside the venire for the grand jury. Said motion was duly filed by the clerk.

Motion held under consideration by the court till to-morrow morning, June 19th.

Second day of the term, June 19th, 1867, the Hon. Horace Austin, judge, presiding.

Motion presented to the court yesterday by John M. Dorman, and held by said court for consideration till this morning, was denied by the court and the defendants excepted.

7 *Challenge to grand jury.*

The State of Minnesota, counties of Brown, Cottonwood, Murray, Pipestone and Redwood, district court, 6th judicial district, adjourned term, A. D. 1867, held at the court-room in the village of Redwood Falls, in the county of Redwood, in the State of Minnesota. First day of adjourned term, Sept. 10th, 1867, the Hon. Horace Austin, judge presiding.

John Nun, John Gut, Antoine Zieher, Henry Hartman, John Hose, Carl Byer, and Melchoir Roth, separately, and each for themselves, challenge the panel of the grand jury summoned to attend the adjourned term of the district court now being held in Redwood County, upon the following grounds, to wit:

1st. That the required number of ballots for said grand jury was not drawn from the grand jury box of Redwood County, or of any other county; nor were any ballots drawn from said grand jury box of Redwood County, or any other county, for the formation of said grand jury.

2d. That the drawing of the ballots of the said grand jury
8 was not had in the presence of the sheriff of Redwood County, or his deputy, and a justice of the peace of said county, or any other sheriff, or deputy, or justice of the peace, or other officer whatever, nor were they drawn at all.

3d. That the drawing of the ballots for said grand jury was not at least fifteen days before the holding of said court.

4th. That the offence for which these parties are held to answer was committed in the county of Brown, State of Minnesota, on the 25th day of December, 1867, and not elsewhere, and cannot be inquired into, or indicted, or presented by a grand jury of any other county than the county of Brown.

5th. That the grand jury, as originally empanneled, was summoned on a special venire issued by an order of the court made at the last term of this court, before any deficiency or absence of grand jurors was known to exist, twenty of said jurors appearing and serving; and that three grand jurors have been ordered to the panel so summoned by a special venire issued at this adjourned term.

Issue was taken on the challenge by the State. The sheriff appointed William Simmons, bailiff, to take charge of the grand jury. Said bailiff was sworn by the court, and the jury was allowed to leave the court-room.

9 The court then took a recess till 7½ o'clock p. m.

7½ O'CLOCK P. M.—The court convened, and the challenge to the panel of the grand jury was argued by Judge Flandrau for the defendants.

9 O'CLOCK P. M.—The court ordered a recess till 8½ a. m., Sept. 11th, 1867.

WEDNESDAY, *Sept. 11th*, 1867, 7½ *o'clock a. m.*—Court convened, and

the roll of the grand jury was called by the clerk: present, 18; absent, 5. The sheriff brought in the 5 absent members. The argument upon the challenge of the panel of the grand jury, and upon the unconstitutionality of the order for holding the said court at Redwood Falls, in the county of Redwood, was resumed by Judge Flandrau for defendants, and Col. McPhail for the State.

1. The facts upon which the said challenge were based, were agreed to be as follows, namely:

That the grand jury was summond upon a special venire, which was issued by the clerk of Redwood County on the 26th day of August, 1867, by virtue of an order which was made by the court at the last term of this court; which order is of record and may be referred to.

2. That the county of Brown had furnished grand jury list,
10 which was filed in the office of the clerk of this court June 18th, 1867, but none of the other counties attached to Brown County for judicial purposes had prepared grand jury lists.

3. That no drawing was made at all of the present grand jury, but it was summoned solely upon the special venire.

4. That twenty of the jurors so summoned appeared and a special venire was issued to fill the panel, and was served by the sheriff, and the panel filled under it.

5. That the offence for which the parties challenging are charged, was committed in the county of Brown on the 25th day of December, 1866.

The challenge to the panel of the grand jury was maintained and allowed by the court, on the ground that the order for the special venire on which the jurors were summoned, was a conditional order, and for no other reason.

The grand jury was then discharged by the court.

The court then ordered that a special venire be issued for twenty-three grand jurors, who returned forthwith, to serve as such grand jurors during the term of said court. The special venire was
11 returned by the sheriff, and, the roll being called, twenty-two members were present. The jury was sworn and charged by the court. The court appointed B. H. Monroe foreman of the grand jury. The counsel for the defendant, held to answer for offences committed in the county of Brown, to wit, John Nun, John Gut, Antoine Zieher, Henry Hartman, John Hose, Carl Byer, and Melchoir Roth, interposed a challenge to the panel of the grand jury, on the ground—

1. That there was a grand jury list on file in the clerk's office from the county of Brown in time for the regular drawing; that the clerk knew of it and had it in his custody, and intentionally omitted to draw the panel of grand jurors from said list in order that the grand jurors should not be composed exclusively of men of Brown County, and in order that the jury might be summoned on a special venire from other counties than the county of Brown.

2. That the sheriff, in summoning the present grand jury, selected intentionally all the old grand jury that had been discharged on challenge of these parties to the panel, except one, Mr. Jacob Mix, and that said sheriff intentionally omitted said Mix because he was from the
12 county of Brown and chose in his place a man from some other county.

3. That the grand jury is not an impartial one and has been unfairly selected by the sheriff because it was supposed to be hostile to these parties challenging.

4. That the law under which this present court is held, and the grand

jury summoned, is unconstitutional, so far as it attempts to authorize an inquiry into indictment or trial of offences committed in Brown County, within Redwood County.

Admitted that there was no drawing of the jury at all, but that it was summoned upon a special venire.

Counsel for the State objects to the challenge being entertained, on the ground that it is not authorized by the statute further than is included in the above admission.

Counsel for the challengers proposes to establish the facts alleged in the challenge by proof, by record, and witnesses.

Court finds as a fact that there is a list of names duly certified by the proper officers of Brown County to have been selected in the county of Brown for grand jurors for the year 1867, which list contains the proper number of names, and was selected at the regular January meeting of the county commissioners of Brown County in 1867, and was
13 filed in the office of clerk of district court of Brown County Feb. 12th, 1867.

Court further rules that the objection of the attorney for the State is sustained, except so far as the facts admitted above and the jury list above described, and refuses to allow any proof of the facts alleged, except as above by said admission and said list, and disallowed the challenge.

Counsel for the challenging parties duly excepted.

Counsel for defendants interposed a challenge to Park Worden, grand juror, under sixth subdivision. Challenge disallowed; exceptions taken.

12 o'clock noon.—Court took a recess till 1½ o'clock p. m.

Court convened at 1½ o'clock p. m.

Challenge to L. O. Root by the same. Challenge disallowed; exception taken. Henry Back challenged by the same. Challenge withdrawn. A. Slocum challenged by the same. Challenge allowed. A. S. Laraby challenged by the same. Challenge disallowed; exception taken. B. H. Monroe challenged by the same. Challenge withdrawn. Defence makes no more challenges. Challenge interposed to grand juror Charles Shoemaker by the State under the sixth subdivision. Defendants object to any challenge being taken on the part of the State for that cause. Objection overruled. Defendants challenging,
14 excepts. Challenge withdrawn. Werner Boesch challenged by the State. Objection overruled; exception. Challenge withdrawn. Frederick Layman challenged by the State. Same objections, ruling, and exceptions. Challenge withdrawn.

The State of Minnesota, district court, sixth judicial, district for the counties of Brown, Cottonwood, Murray, Pipestone, and Redwood.

STATE OF MINNESOTA
against
JOHN GUT, JOHN HOSE, JOHN NUN, ANTOINE Zieher, Carl Byer, John Stamm, Melchoir Roth, alias Jack Roth, Nicodemus Wernz, Jost Pfieffer, August Schmidt, Henry Hartman, Frank Grebe, and George Kennan.

John Gut, John Hose, John Nun, Antoine Zieher, Carl Byer, John Stamm, Melchoir Roth, alias Jack Roth, Nicodemus Wernz, Jost Pfieffer, August Schmidt, Henry Hartman, Frank Grebe, and George Kennan

are accused by the grand jury of the counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, in the State of Minnesota, by this indictment, of the crime of murder in the first degree, committed as follows:

15 The said John Gut, John Hose, John Nun, Antoine Zieher, Carl Byer, John Stamm, Melchoir Roth, alias Jack Roth, Nicodemus Wernz, Jost Pfieffer, August Schmidt, Henry Hartman, Frank Grebe, and George Kennan, on the twenty fifth day of December, A. D. 1866, at the town of New Ulm, in the said county of Brown, State of Minnesota, without the authority of law and with malice aforethought, killed Alexander Campbell, by then and there beating him with clubs, stabbing him with knives, dragging him with a rope tied about his neck, and hanging him by the neck with a rope, all of which said beating, stabbing, dragging, and hanging caused the said Alexander Campbell then and there to die.

Contrary to the statute in such case made and provided, and against the peace and dignity of the State of Minnesota.

Dated at Redwood Falls, in the county of Redwood, the eighteenth day of September, A. D. 1867.

B. H. MONROE,

Foreman of the Grand Jury of the Counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, in the State of Minnesota.

16 Names of witnesses examined before the grand jury: L. M. Holms, John H. Coffin, Palmer Lee, Alonzo Lee, Salmon Roberts, Jonas Landenschlager, George F. Lathrop, George Schneider, P. T. Gibbs, James H. Doty, Frederick Needhammer, Peter Mack, Jacob Nimtz, Julius Redman, Gotlieb Oswald, August Helman, William Geiseke.

(Endorsed in the usual way, and filed in the clerk's office of the county of Redwood, on the 18th day of September, 1867, and afterwards filed in the clerk's office of Nicollet County, on the 14th day of November, 1867.)

Plea.

The State of Minnesota, counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, district court, 6th judical district, adjourned term, A. D. 1867, held at the court-room in the village of Redwood Falls, in the county of Redwood, in the State of Minnesota, eleventh day of the term, Sept. 20th, 1867, the Hon. Horace Austin, judge, presiding.

17 By order of the court, John Gut, Jost Pfieffer, John Stamm, and Melchoir Roth, were arraigned before said court.

The indictment was read to them by the attorney general. Counsel for the above-named John Gut, defendant, asked till to morrow morning, at 8½ o'clock, to plead.

Request granted.

He, the said John Gut, having been required to plead to the indictment (the time taken therefor by his counsel on the arraignment having elapsed), and when asked whether he plead guilty or not guilty to the indictment, stood mute, and refused to answer. Whereupon the court ordered the plea of not guilty to be entered for and in behalf of the said defendant.

Minutes of trial of John Gut.

State of Minnesota, district court, Nicollet County.—Adjourned term, fourth day of adjourned term, January 23d, 1868.

18 Court convened as per adjournment, the Honorable Horace Austin, judge, presiding. Attorney General Cornell announced to the court, on behalf of the State, that his witnesses had arrived, and he was now ready to proceed to trial with the case entitled "The State of Minnesota against John Gut." Chas. E. Flandrau, esq., on behalf of the defendant, asked that this case might be postponed for the present, and the next one in order on the calender be taken up in its stead, for the reason that none of the witnesses for the defendant Gut had yet arrived at court. Attorney General Cornell insisting that the first case on the calender should be the first one put on trial, and the defendant's counsel not showing to the satisfaction of the court that due diligence had been used to procure said witnesses, the application of Attorney General Cornell was sustained, and the case of the State of Minnesota against John Gut was accordingly set for trial.

The defendant Gut being in court, his attorney, Chas. E. Flandrau, esq., interposed a challenge, in writing, to the panel of the petit jury, as follows:

Challenge to panel of petit jury.

19 State of Minnesota, district court, county of Nicollet, sixth judical district.

THE STATE OF MINNESOTA
ag'st
JOHN GUT ET AL., FOR THE KILLING OF ALEX. Campbell.

The defendant Gut, in the above-entitled action, challenges the panel of the petit jurors drawn and returned for this term of this court for the following reasons, to wit:

1st. That the list of jurors, from which said panel is drawn, selected by the county commissioners of Nicollet County, is not regular in this, that it does not appear to have been made at the annual meeting of said commissioners in January, 1867. That such list is not attested by the clerk of said board, and was not forthwith filed with the clerk of the district court.

2d. That the said panel was not drawn in accordance with law, in this, that it was drawn by the clerk of this court, the sheriff of this county, and a justice of the peace, when the statute provides that it shall be drawn by the clerk in the presence of said officers.

3d. That said jurors were not summoned according to law, in this, that it appears from the return of the sheriff to the venire issued
20 to him to summon said jury, that he did not serve said venire upon twenty of the jurors named therein, but that he served "the summons upon the within-named parties to serve as jurors, by reading to them," referring, in this language, to twenty of said jurors, and he summoned three of the others by leaving at their residences a copy of the venire, and not the notice required by law.

4th. That said venire was not returned according to law, in this, that it was returned to the clerk on the day before the session of the court

for which said jurors were to be summoned, and not to the court at the opening thereof, as the law requires.

5th. That there has been a new panel selected for the year 1868, and the defendants are entitled to a jury drawn from that panel.

CHAS. T. CLOTHIER AND
CHAS. E. FLANDRAU,
Atty's for Defendants.

The State denied the said challenge on the 1st, 2d, 3d, and 4th grounds, and excepted to the same on the 5th ground as stated in said challenge. After hearing evidence as to the manner in which the jury was drawn, and the arguments of counsel, the court overruled the
21 challenge, and the defendant duly excepted.

Both parties being in readiness, the court ordered the drawing of the jury to commence. The names composing the regular panel of jury were then placed in the box. M. G. Hanscome, Sumner, Ladd, and J. R. Gardner having been appointed triers by the court, and duly sworn, the drawing was commenced and continued until all the names composing the regular panel having been drawn, and only seven jurors obtained, the court ordered the sheriff to summon bystanders to act as jurors in the case. In this way three more jurors were obtained and sworn in, making in all ten.

The court then ordered the clerk to issue a special venire for ten men, returnable at half past nine o'clock a. m. of to-morrow, January 24th, 1868, to which time an adjournment was ordered.

Fifth day of adj'd term, Jan. 24th, 1868.

Court convened as per adjournment, the Hon. Horace Austin, judge, presiding.

The names of the persons returned by the sheriff on the special venire issued yesterday to him having been placed in the box in the
22 usual way, the court ordered the drawing to proceed. These names having been drawn from the box, without obtaining any additional jurors, the court ordered the sheriff to again summon talesmen from the bystanders to act as jurors. In this way two more were obtained and sworn in, which completed the panel.

THE STATE OF MINNESOTA
against
JOHN GUT.

The jury in the above-entitled case, as summoned, drawn, and sworn, is made up of the following-named persons: Fred. L. Otto, Luther Morton, Price B. Harding, F. M. Kennedy, E. Lilleby, J. A. Norwood, Dennis O'Brien, A. D. Fisher, William Delaughter, John McDonald, Henry Trepanier, Peter Harff.

The State was represented by Attorney General Cornell, and Chas. S. Bryant, county attorney; the defendant by Chas. E. Flandrau, John M. Dorman, and Chas. T. Clothier.

23 Mr. Bryant appeared and stated the case on behalf of the State to the court and jury.

L. N. Holmes was then called to the witness stand on behalf of the State, and, being duly sworn, was examined and cross-examined.

Frederick A. Brandt was next called to testify on behalf of the State, and, being first sworn, was examined and cross-examined.

Court then adjourned until half past nine o'clock a. m., of Saturday, Jan. 25th, 1868, the judge first ordering that the jury be not allowed to separate until the further order of this court, and giving them into the custody of the sheriff.

Sixth day of adj'd term, Jan. 25th, 1868.

Court convened this a. m., as per adjournment; the Hon. Horace Austin, judge, presiding.

In the case of the State of Minnesota against John Gut, on trial, Jonas Landenschlager, Dr. William Clark, Palmer Lee, Alonzo Lee, and D. H. Tyner were called to the witness stand, and were each duly sworn, examined, and cross-examined. Whereupon an adjournment was ordered until half-past nine o'clock a. m., of Monday, January 27th, 1868, and court adjourned accordingly.

24 Seventh day of adj'd term, Jan. 27th, 1868

Court convened as per adjournment; the Hon. Horace Austin, judge, presiding.

John H. Coffin, James Doty, George F. Lathrop, and Frederick Needhammer were called to the witness stand on behalf of the State, and each duly sworn, examined, and cross-examined.

Court then adjourned until half-past nine a. m., of Tuesday, Jan. 28th, 1868.

Eighth day of adj'd term, Jan. 28th, 1868.

Court convened as per adjournment; the Hon. Horace Austin, judge, presiding.

George Schneider was called to the witness stand on behalf of the State, duly sworn, examined, and cross-examined. Whereupon court adjourned until half-past nine o'clock a. m., of Wednesday, Jan. 29th, 1868.

Ninth day of adj'd term, Jan. 29th, 1868.

Court convened as per adjournment; the Hon. Horace Austin, judge, presiding.

Frederick A. Brandt was here recalled to the witness stand, and further examined and cross-examined.

25 Charles Foster and Porter T. Gibbs were next called to the witness stand, on behalf of the State, and each duly sworn, examined, and cross-examined Whereupon the State rested.

Judge Flandrau then stated the case of the defendant to the court and jury, after which he called to the witness stand Alonzo Lee, at the beginning of whose examination he made to the court in writing the following offer of proof:

Offer of proof.

Defendant offers to prove—

1st. That at the time of the killing of Alexander Campbell, the person named in the indictment in this action, there existed a state of war between the United States and the Sioux tribe of Indians, which tribe

or nation is composed of Indians and half-breeds; the actual theatre of which war was the State of Minnesota, and particularly the western frontier of said State. That many of the half-breeds of said tribe were engaged with said tribe in open hostilities against said United States, and were at war with said tribe against the said United States.

26 2d. That the State of Minnesota had, through its legal authorities, offered rewards for the killing by any person of any male of said tribe, which offer was then in full force. That the said Campbell and one Liscom came into the town of New Ulm, on the day said Campbell was killed, from the western frontier of this State. That said Campbell and Liscom were then and there dressed in the garb of half-breeds of said tribe of Indians; danced the war and other dances of said tribe; and then and there killed John Spinner, a citizen of the United States and resident of the town of New Ulm, Brown County, Minnesota.

3d. That the mode of warfare of said tribe of Indians and half-breeds was and is by small bands or parties of said Indians and half-breeds, making incursions into the frontier settlements, and killing single persons or families.

4th. That the parties who killed said Campbell, including this defendant, were then and are now citizens of the United States; and then and there believed said Campbell to be an Indian or half-breed of said tribe of Sioux Indians, so at war with the United States as aforesaid, and then and there engaged in such war in the killing of

27 said Spinner; and that the killing of said Campbell was from no other motive whatever.

The court took the offer under consideration. Meanwhile the witness was excused. Dr. Alfred Muller and Francis Bongol were then called to the witness stand on behalf of the defence, each of whom, being duly sworn, was examined and cross-examined.

Court then adjourned until half-past nine o'clock a. m., of Thursday, Jan. 30th, 1868.

Tenth day of adj'd term, Jan. 30th, 1868.

Court convened as per adjournment; the Hon. Horace Austin, judge, presiding.

Francis Bongol was here recalled to the witness stand on behalf of the defence, and further examined and cross-examined.

Alonzo Lee was next called to the witness stand, examined, and cross-examined.

Judge Flandrau then offered in evidence the depositions of certain persons taken before the justice of the peace, on the preliminary examination of this case, setting out that said persons are now beyond the jurisdiction of this court, and cannot be had at this term. Objected to by the attorney general on the ground—

28 (1) Because they are incompetent, and (2) because the foundation for their introduction has not been laid.

The objection was sustained by the court, and the ruling excepted to by the defendant.

The offer of proof made yesterday by defendant's counsel was here overruled by the court and excepted to by the defendant; whereupon

The defence rested.

The arguments of counsel were then commenced, John M. Dorman, esq., appearing and arguing the case on behalf of the defence. Mr. Bryant then argued the case on behalf of the State, and was followed by Chas. E. Flandrau, esq., for the defence.

Court then adjourned until half-past nine o'clock a. m., of Friday, Jan. 31st, 1868.

Eleventh day of adj'd term, Jan. 31st, 1868.

Court convened as per adjournment; the Hon. Horace Austin, judge, presiding.

The closing argument in behalf of the State in the case before the court was here made by the attorney general, after which a recess was ordered until 2 o'clock p. m.

AFTERNOON.—Court again convened at 2 o'clock p. m., when the jury in the case before the court were charged by the judge.

29 E. L. Martindale was then sworn in as bailiff, and the jury retired to their deliberations in his charge.

Verdict.

THE STATE OF MINNESOTA } *ag'st* JOHN GUT. } Indicted for murder in the first degree.

The jury in the above-entitled cause were here conducted into court by their bailiff, and through their foreman returned a verdict against the defendant, in writing, in the following words:

"We, the jury, find a verdict of guilty, with a recommendation of the clemency of the court."

"WM. DELAUGHTER, *Foreman.*"

The verdict being read to the jury as above rendered, and they being questioned as to whether it was their true verdict, all answered that it was.

On application of Judge Flandrau the jury were then polled, and to the question, "Was this and is this your verdict?" each juror responded in the affirmative.

The jury were then discharged from the further consideration of this case.

30 Defendant's counsel gave notice of motion for a new trial.

Court then adjourned until nine o'clock a. m., of Saturday, Feb'y 1st, 1868.

Twelfth day of adj'd term, Feb. 1st. 1868.—Afternoon.

THE STATE OF MINNESOTA } *against* JOHN GUT. } Sentence.

The defendant in the above-entitled action having been indicted by the grand jury of the counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, for the crime of murder in the first degree, by killing Alexander Campbell, and the said defendant having been duly tried and convicted of said offence at this term of the court, and having been produced in court by the sheriff to be sentenced for said offence, and after hearing what he had to say why the sentence of the law should not be passed upon him;

Ordered, That the said defendant, John Gut, be taken herefrom to the common jail of the county, and there be kept in solitary confinement until Friday, April 3d, A. D. 1868, and that on that day, between the hours of ten o'clock in the forenoon and two oclock in the
31 afternoon, he be taken therefrom to the place of execution and hanged by the neck until he is dead.

STATE OF MINNESOTA, *District Court, Nicollet County:*

I, A. R. McGill, clerk of the district court in and for the county of Nicollet, Minnesota, hereby certify that the foregoing is a true and correct copy of the judgment roll in the case of the State of Minnesota against John Gut, on file in my office.

Dated at St. Peter, Minn., March 31st, 1868.

[SEAL.] A. R. McGILL,
Clerk of said Court.

(Endorsed, as follows): Filed April 8th, 1868.
SHERWOOD HOUGH, *Clerk.*

32 State of Minnesota supreme court.—General term, July, A.D. 1868.

THURSDAY MORNING, *nine o'clock, August 13th*, 1868.—Court convened pursuant to adjournment. All the justices being present.

No. 16.

THE STATE OF MINNESOTA, RESPONDENT,
vs.
JOHN GUT, APPELLANT. } 1014.

This cause came on to be heard this day upon the return to the appeal herein. And thereupon the same was argued and submitted by counsel for the respective parties, and taken under advisement by the court.

A true record:
Attest: SHERWOOD HOUGH, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the minutes of argument in the above-entitled cause.
Attest: SHERWOOD HOUGH, *Clerk.*

33 State of Minnesota supreme court.—July term, A. D. 1868.

1014.

No. 16.—Appeal from district court, 6th judicial district, county of Nicollet.

THE STATE OF MINNESOTA, RESPONDENT,
vs.
JOHN GUT, APPELLANT.

This cause having been duly argued and submitted at the general July term of this court, A. D. 1868, upon the return to the appeal herein: Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that its sentence be executed.

Entered February 26th, A. D. 1869. By the court:
Attest: SHERWOOD HOUGH, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled action.

SHERWOOD HOUGH, *Clerk.*

34 State of Minnesota supreme court.—July term, A. D. 1868.

1014.

THE STATE OF MINNESOTA, RESPONDENT,
vs.
JOHN GUT, APPELLANT. } No. 16.

Pursuant to an order of court duly made and entered in this cause on the 26th day of February, A. D. 1869, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the sixth judicial district, sitting within and for the county of Nicollet, be, and the same hereby is, in all things affirmed, and that its sentence be executed.

Dated and signed this 26th day of February, A. D. 1869.

By the court:

Attest: SHERWOOD HOUGH, *Clerk.*

35 STATE OF MINNESOTA, *Supreme Court, ss:*

I, Sherwood Hough, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of our said supreme court, at the capitol in the city of Saint Paul, this 26th day of February, A. D. 1869.

[SEAL.] SHERWOOD HOUGH, *Clerk.*

The foregoing papers attached together and endorsed: Judgment roll. Filed February 26th, 1869.

SHERWOOD HOUGH, *Clerk.*

36 State of Minnesota, counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, district court, 6th judicial district.

THE STATE OF MINNESOTA
against
JOHN GUT, WHO IS INDICTED, WITH OTHERS, for the killing of Alexander Campbell. } Bill of exceptions.

This was an indictment for murder in the first degree against the above-named defendant, John Gut, and others, for the killing of Alexander Campbell, at New Ulm, in the county of Brown, and State of Minnesota, on the 25th day of December, A. D. 1866.

On the 9th day of March, 1867, the legislature of the State of Minnesota passed an act entitled "An act to change the titles of and regulate the holding of courts for counties unorganized for judicial purposes, and to regulate the manner in which the counties to which they are attached for such purposes, and to provide for the transaction of business of counties which have no county commissioners."

37 On the 25th day of May, 1867, the judge of the sixth judicial district of the State of Minnesota, at his chambers, issued the following order:

"The State of Minnesota, district court, 6th judicial district, counties of Brown, Cottonwood, Murray, Pipestone, and Redwood.

"It appearing to my satisfaction that the furtherance of public justice requires that the place for holding the general terms of the district court in and for the counties above named should be changed from the county of Brown to one of the other counties above mentioned:

"Now, therefore, be it, and it is hereby, ordered, that the place for holding the said court for the counties first above named, be, and the same is hereby, changed from the town of New Ulm, and county of Brown, to the town and village of Redwood Falls, in the said county of Redwood.

"And that the next regular term of said court, as well as all sessions of said courts to be held in and for said counties, until the further order of the court, be held at the village of Redwood Falls, in the said county of Redwood.

38 "And that the several clerks of the courts in, of, and for the said respective counties, do make the venires for the grand and petit juries, drawn, or to be drawn, for the said next general term, as well as all other writs, papers, and proceedings returnable to said county, at the court-room, in the said village of Redwood Falls, on the third Tuesday in June next, at the hour specified by law.

"It is further ordered that this order be entered by said clerks on the records of said court of their respective counties immediately upon its receipt by them severally.

"Done at chambers, this 25th day of May, A. D. 1867.

"HORACE AUSTIN,

"*Judge District Court Sixth Judicial District*

"*State of Minnesota.*"

That in pursuance of said order, the said court convened at Redwood Falls, in the county of Redwood aforesaid, on the 18th day of June, 1867. That at the said term, and on the 25th day of June, 1867, the court made the following order, to wit:

"Whereupon it is ordered by the court, that when this court
39 shall this day adjourn, it shall adjourn to again convene at this place, as an adjourned term of the court, on Tuesday, the tenth day of September next (1867), at 12 o'clock noon, and that grand and petit jurors be duly returned to the said adjourned term by the proper officers, according to law.

"And it is further ordered that in case of any neglect or default to draw the said juries according to law, then, and in such case of neglect or default, two special venires be issued by the clerk of the court, duly attested, at least fourteen days before the first day of the said adjourned term, and directed and delivered to the sheriff of Redwood County, severally requiring and commanding him to summon twenty-three electors of this trial district, duly qualified to act as jurors, to make a grand jury, and thirty-six electors of said district, with the same qualifications, to make a petit jury. And the said sheriff shall, in such case, by virtue of this order, and the said special venires, summon and return such jurors accordingly."

That in pursuance of said order, on the 10th day of September, 1867, the said court did convene at the said Redwood Falls.

That on the said 10th day of September, 1867, at said court,
40 this defendant, who had been held to answer for the charge of murder, in killing said Alexander Campbell, at New Ulm, afore-

said, on the 25th day of December, 1866, did interpose a challenge to the panel of said grand jury, which said challenge was by the said court sustained, and the said grand jury discharged by the court. Whereupon the said court immediately ordered the issuance of a special venire for twenty-three grand jurors to be returned forthwith to serve as such grand jurors during the term of said court then in session, which special venire was immediately placed in the hands of the sheriff of Redwood County, who then and there summoned all of the members of said grand jury which had just been discharged as aforesaid upon the challenge of this defendant, except Jacob Mix, who was then and there present, but who was not summoned by said sheriff, but said sheriff summoned another man in his stead. That the grand jury so summoned by the said sheriff was then and there sworn and charged by the court.

That this defendant then and there interposed the following challenge to the panel of said grand jury, to wit:

"The counsel for the defendant held to answer for offences
41 committed in the county of Brown, to wit, John Gut, interposes a challenge to the panel of the grand jury, on the ground that there was a grand jury list on file in the clerk's office from the county of Brown in time for the regular drawing. That the clerk knew of it, and had it in his custody, and intentionally omitted to draw the panel of grand jurors from said list in order that the grand jurors should not be composed exclusively of men of Brown County, and in order that the jury might be summoned on a special venire from other counties than the county of Brown.

"2d. That the sheriff, in summoning the present grand jury, selected intentionally all the old grand jury that had been discharged on challenge of this party to the panel, except one, Mr. Jacob Mix, and that said sheriff intentionally omitted said Mix because he was from the county of Brown, and chose in his place a man from some other county.

"3d. That the grand jury is not an impartial one, and has been unfairly selected by the sheriff, because it was supposed to be hostile to this party challenging.

42 "4th. That the law under which this present court is held, and the grand jury summoned, is unconstitutional, so far as it attempts to authorize any inquiry into indictment, or trial of offences committed in Brown County, and without Redwood County."

It was admitted by the State that there was no drawing of the jury at all, but that it was summoned upon a special venire.

The counsel for the State then objected to the challenge being entertained on the ground that it was not authorized by the statute further than is included in the above admission.

The counsel for the defendant then and there proposed to establish the fact alleged in the challenge by proof, by record, and witnesses.

The court allowed the defendant to prove, and upon such proof found the following fact, to wit:

"That there is a list of names duly certified by the proper officers of Brown County, which had been selected in the county of Brown, for grand jurors for the year 1867, which list contains the proper number of names, and was selected at the regular January meeting of the county commissioners of Brown County in 1867, which list was
43 filed in the office of the clerk of the district court of Brown County, on the 12th day of February, 1867, and was transferred to and filed in the office of the clerk of the district court of Redwood County on the 18th day of June, 1867."

The court then sustained the objection of the counsel for the State to said challenge, except so far as the facts admitted above and the jury list above described, and refused to allow any proof of the facts alleged in said challenge, except as above stated, and disallowed said challenge.

Whereupon the counsel for the said defendant excepted to the ruling and decision of the court.

The defendant then and there interposed a challenge to one of the said grand jurors, to wit, Park Worden, under the sixth subdivision of section 15, of chapter 107, of the general statutes of Minnesota, and the State took issue upon the said challenge.

The juror was then sworn as a witness in support of said challenge, and testified as follows:

"I have resided in Redwood Falls for about three or four weeks; I resided previous to that in Blue Earth County, in Mankato; I resided in Mankato on the 25th of December last. I heard of the killing of Campbell and Liscom at New Ulm a few days after it was done.
44 There was much excitement in that community about the affair. I heard a good deal said about the affair; did not talk a good deal about it myself; I went to see the bodies of the parties killed. I have heard that parties were examined and held to bail for this offence. I have heard that certain persons were arrested and held to bail in New Ulm for the offence. Heard that a court set here and the grand jury investigated the case last June. Think I heard they found no bill; think the grand jury ought to have been able to find out the offenders, but that I never expressed any opinion about it, it may have been simply a want of diligence. I have no personal feelings against the parties accused, and should not have till it should be proved to my satisfaction that they were guilty of the crime. My idea is that some one was murdered there. Think it would take considerable evidence to relieve my mind of the idea that some one was murdered there. If the defendants should be proved to have committed the deed or to have been active participants in the murder, it would take a good deal of testimony to convince me that they are not guilty. Believe that the men killed lived in
45 Mankato at the time. I did not know them. Think it was generally believed that many had participated in the killing. I had just moved to Mankato and was not wedded to the place. Was not in town daytimes, only nights. My place of business was out of town. I did not enter into the feeling of hostility existing at Mankato on the subject."

On cross-examination the witness further testified:

"When I say that I think that some one was murdered there (at New Ulm), I mean I thought the killing was not legal. My impressions, what I had, were predicated on what I read and heard only. I think I could render a verdict according to the evidence exclusively, and without regard to what I have read or heard."

To the court's question:

"I have neither formed or expressed any opinion as to the guilt or innocence of the persons accused, or any of them. My impression only is that somebody committed an offence there in the killing of those men."

The court disallowed the challenge, and to such ruling and decision of the court the counsel for the defendant then and there excepted.

The counsel for the defendant then interposed a challenge to
46 the grand juror Lawrence Root, under the 6th subdivision of section 15, of chapter 107, of the said statutes.

The State took issue upon said challenge, and the defendant called as a witness in support of said challenge the juror Lawrence Root, who, being duly sworn, testified as follows:

"I have resided in Redwood Falls for two years. I was bailiff of the grand jury at the last term of this court. I know the name of one of the parties held here for the offence of killing Alexander Campbell and George Liscom, at New Ulm. It is Mr. Gut. There are several others held for the same offence. I have never formed or expressed any opinion on this case."

The challenge was disallowed on this evidence, and the defendant duly excepted to such ruling and decision of the court.

The defendant then interposed a challenge to the juror Alba S. Laraby, under the same subdivision as the last; which challenge was denied by the State, and the defendant called as a witness in support of the same the said juror Alba S. Laraby, who, being duly sworn, testified as follows:

"I reside at Cottonwood River, twelve miles from New Ulm. Have heard a good deal about the killing of Campbell and Liscom, at
47 New Ulm. Heard of the examination of the parties charged with said killing. Knew but one of the parties that were held by the magistrate. All I have heard was from common report. I was at the time and am now satisfied a crime had been committed in such killing. I was satisfied that those who killed the men at New Ulm were guilty of a crime. If the men held here were engaged in that affair at New Ulm, I am satisfied they were guilty of a crime, if they killed as reported."

Being cross-examined by the State, he testified:

"I have formed and expressed no opinion as to whether these parties held here are the guilty parties."

The testimony then closed and the court disallowed the challenge; to which ruling and decision of the court the defendant then and there duly excepted.

The counsel for the State then interposed a challenge to one of the said grand jurors under the said 6th subdivision of said 15th section of said statute, to wit, to the juror Charles Shoemaker.

The defendant objected to the challenge being entertained by the court on the ground that the State had no right to challenge an individual grand juror for that cause, or for any cause. The court
48 overruled said objection. To which ruling and decision of the court the said defendant duly excepted.

The counsel for the State then had the said juror sworn, and asked him several questions concerning his residence and knowledge and opinions of and upon the matter of the killing of the said Alexander Campbell and George Liscom, on the 25th day of December, 1866, at New Ulm, aforesaid, and the said juror answered the same, and the counsel for the State then withdrew said challenge, and the said juror acted as one of the said grand jury.

The said grand jury then retired to their deliberation, and on the 17th day of September, 1867, came into said court and presented to said court an indictment against this defendant, John Gut, and others, charging them with the crime of murder in the first degree, in the killing of Alexander Campbell, at the town of New Ulm, in the county of Brown, and State of Minnesota, on the 25th day of December, 1866; which said indictment was on the said 17th day of September, 1867, filed in the office of the clerk of the said court.

On the 18th day of September, 1867, the said grand jury presented to the said court a second indictment against this defendant and the
49 same other parties before indicted for the same offence charged in the indictment presented by them on the said 17th day of September, 1867, to wit, the murder of said Alexander Campbell, at New Ulm, aforesaid, on the said 25th day of December, 1866.

On the 18th day of September, 1867, the defendants charged in the said indictment so found and filed on the 17th day of September, 1867, were arraigned on said last-named indictment, but did not then plead to the same, but on the 19th day of September, 1867, made a motion to set aside the said indictment.

The court refused to entertain the motion at that time, as it appeared upon the argument that the defendants had, upon the arraignment, been served with defective and untrue copies of the indictment; whereupon the court ordered that said arraignment be set aside and a new arraignment had before the motion should be entertained, and the defendants duly excepted. The attorney general, on behalf of the State, then moved the court for leave to set aside the said indictment, so found Sept. 17th, 1867, and dismiss the same, for the reason that there is another indictment against the same parties for the same
50 offence, and the said motion was allowed by the said court for that reason, and said indictment and the prosecution thereon were ordered dismissed accordingly, without objection from the defendants or their counsel.

The attorney general, on behalf of the State, then moved the arraignment of the defendant, under the indictment found and filed on the 18th day of September, 1867, as aforesaid, and this defendant, with the others charged, were accordingly arraigned under said second indictment.

That said indictment, under which said defendants were secondly arraigned, is in the words and figures following, that is to say:

"The State of Minnesota district court, sixth judicial district, for the counties of Brown, Cottonwood, Murray, Pipestone, and Redwood.

"STATE OF MINNESOTA
against
JOHN GUT, JOHN HOSE, JOHN NUN, ANTOINE Zieher, Carl Byer, John Stamm, Melchoir Roth, alias Jack Roth, Nicodemus Wernz, Jost Pfeiffer, August Schmidt, Henry Hartman, Frank Grebe, & George Kennan.

"John Gut, John Hose, John Nun, Antoine Zieher, Carl Byer,
51 John Stamm, Melchoir Roth, alias Jack Roth, Nicodemus Wernz, Jost Pfieffer, August Schmidt, Henry Hartman, Frank Grebe, and George Kennan are accused by the grand jury of the counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, in the State of Minnesota, by this indictment, of the crime of murder in the first degree, committed as follows:

"The said John Gut, John Nun, John Hose, Antoine Zieher, Carl Byer, John Stamm, Melchoir Roth, alias Jack Roth, Nicodemus Wernz, Jost Pfieffer, August Schmidt, Henry Hartman, Frank Grebe, and George Kennan, on the twenty-fifth day of December, A. D. 1866, at the town of New Ulm, in the county of Brown, State of Minnesota, without the authority of law, and with malice aforethought, killed Alexander Campbell, by then and there beating him with clubs, stabbing him with knives, dragging him with a rope tied about his neck,

and hanging him by the neck with a rope, all of which said beating, stabbing, dragging, and hanging caused the said Alexander Campbell then and there to die.

"Contrary to the statute in such case made and provided, and against the peace and dignity of the State of Minnesota.

"Dated at Redwood Falls, in the county of Redwood, the
52 eighteenth day of September, A. D. 1867.

"H. B. MONROE,
"*Foreman of the Grand Jury of the Counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, in the State of Minnesota.*

"Names of witnesses examined before the grand jury—L. N. Holmes, J. H. Coffin, Palmer Lee, Alonzo Lee, Solomon Roberts, Jonas Landenschlager, George F. Lathrop, George Schneider, P. T. Gibbs, James H. Doty, Frederick Needhammer, Peter Mack, Jacob Nimtz, Julius Redman, Gotlieb Oswald, August Helman, William Geiseke."

Which said indictment is endorsed as follows:

"The State of Minnesota, district court, sixth judicial district, for the counties of Brown, Cottonwood, Murray, Pipestone, and Redwood.

"STATE OF MINNESOTA *against* JOHN GUT, JOHN HOSE, JOHN NUN, ANTOINE Zieher, Carl Byer, John Stamm, Melchoir Roth, alias Jack Roth, Nicodemus Wernz, Jost Pfieffer, August Schmidt, Henry Hartman, Frank Grebe, and George Kennan.	Indictment for murder in the first degree.

53 "A true bill.

"B. H. MONROE,
"*Foreman of the Grand Jury.*

"Office of the clerk of the district court in and for Redwood County, State of Minnesota.

"Filed this 18th day of September, A. D. 1867.

"B. FLYNN, *Clerk.*"

This defendant, together with the other defendants charged in said indictment, then moved the court to set aside the said indictment, for the following, among other grounds, to wit:

1st. That the said indictment is not found and presented as prescribed by the statutes of this State, in this—

That the said indictment shows upon its face that it was found in the county of Redwood, by a grand jury sitting at a term of the district court in and for the said county, and it also appears that the crime for which the defendants are charged, in and by said indictment, was committed in the county of Brown, State of Minnesota, on the 25th day of December, 1866, and was not committed in the county of Redwood, where said indictment was found.

3d. That the law under which said indictment was found is unconstitutional and void, in authorizing the indictment and trial of
54 persons charged with offences committed before the passage of said act, in counties other than those where the said crimes were committed.

4th. That said law is unconstitutional and void in this, that it embraces two distinct subjects-matter, only one of which is expressed in the title of said act.

5th. That there was another indictment pending in this court against the same parties for the same offence at the time when this indictment was found by the grand jury. Which first indictment had not been set aside or otherwise disposed of, nor had the charge embraced in said indictment been resubmitted to said grand jury or any other grand jury by the court, but said first indictment was in full force at the time of the finding of the said second indictment.

The court overruled the said motion, and the defendants duly excepted to the ruling and decision of the court.

(All as to demurrer is stricken out by the court.)

The defendants then plead to the said indictment the plea of not guilty, all except the defendant John Gut, who standing mute when called upon to plead, the court ordered that a plea of not guilty be entered by the clerk for the said defendant, John Gut; which
55 plea was entered accordingly by said clerk.

The place of trial or venire of the cases in said indictment was then, upon the application of this and the other defendants, supported by their affidavits, from which it appears to the satisfaction of the court that a fair and impartial trial could not be had in the said trial district composed of the counties of Brown, Cottonwood, Murray, Pipestone, and Redwood, changed by order of the court to the county of Nicollet, pursuant to section 1 of chapter 123, page 654, of the General Statutes.

At an adjourned term of this court held in and for the said county of Nicollet, on the 23d day of January, 1868, the said indictment was moved for trial by the attorney general on the part of the State; and the said defendant, John Gut, then and there objected to being tried under the said indictment in this case, on the ground that said indictment charges him with a crime alleged in said indictment to have been committed in the county of Brown, in this State, on the 25th day of December, 1866; and said indictment shows upon its face that it was found by a grand jury of the county of Redwood, sitting in the said county of Redwood, under the pretended law passed subsequently to the commission
56 of said crime; which said law, so far as it authorizes the indictment of crimes committed before its passage, in counties other than the one in which the crime was committed, is unconstitutional and void. The court overruled the said objection, and the defendant, John Gut, duly excepted to the ruling and decision of the court. The defendant, John Gut, then interposed the following challenge to the panel of the petit, or trial jury, to wit:

The defendant, John Gut, challenges the panel of the petit jurors drawn and returned for this term of this court, for the following reasons, to wit:

1st. That the list of jurors from which said panel is drawn, selected by the county commissioners of Nicollet County, is not regular in this, that it does not appear to have been made at the annual meeting of said commissioners in January, 1867. That said list is not attested by the clerk of said board, and was not forthwith filed with the clerk of the district court.

2d. That the said panel was not drawn in accordance with law, in this, that it was drawn by the clerk of this court, the sheriff of this county, and a justice of the peace, when the statute provides that it shall be drawn by the clerk in the presence of said officers.

57 3d. That said jurors were not summoned according to law, in

this, that it appears from the return of the sheriff to the venire issued to him to summon said jury, that he did not serve the same upon twenty of the jurors named therein, but that he served "the summons upon the within-named parties to serve as jurors, by reading to them," referring in the language to twenty of said jurors, and he summoned three of the others by leaving at their residences a copy of the venire, and not the notice required by law.

4th. That said venire was not returned according to law, in this, that it was returned to the clerk on the day before the session of the court for which said jurors were to be summoned, and not to the court at the opening thereof, as the law requires.

5th. That there has been a new panel selected for the year 1868, and the defendant is entitled to a jury drawn from that panel.

The State denied the said challenge on the 1st, 2d, 3d, and 4th ground, and excepted to the same on the 5th ground as stated in said challenge.

Issue being so joined upon said challenge, the counsel for the
58 said defendant, John Gut, offered in evidence in support of the same.

1st. The list of petit jurors selected by the county commissioners of Nicollet County for the year 1867, which was as follows:

"List of persons selected for petit jurors by the county commissioners in January, 1867."

Then follows 72 names and the following certificate:

"I certify that the above-named persons were duly selected for petit jurors for the year 1867, by the board of county commissioners of Nicollet County, at a regular meeting of said board held in January, 1867.

"R. B. PIERCE,
"*Chairman County Commissioners.*

"Attest:
"BENJ. ROGERS, *County Auditor.*

"(Endorsed:) List of petit jurors for 1867. Filed Sept. 20th, 1867.
"A. R. MCGILL, *Clerk.*"

2d. An entry in the records of said court of the drawing of said jury, which was as follows:

First. "Petit jurors, regular panel."

Then followed the names of twenty-four jurors, and the following certificate:

59 "We, the undersigned, hereby certify that the foregoing names of petit jurors were by us drawn on the 23d day of September, A. D. 1867, from the full number of seventy-two names as returned by the chairman of the board of county commissioners for the year 1867.

"A. R. MCGILL,
"*Clerk of said Court.*
"AZRO A. STONE,
"*Sheriff of said Court.*
"W. G. HAYDEN,
"*Justice of the Peace.*"

3d. The venire upon which the said jury was drawn, which was in the usual form, and the return of the sheriff to the same, which is as follows:

"State of Minnesota, county of Nicollet, district court, 6th judicial district.

"I hereby certify and return that, in obedience to the within writ, I

did, at least six days before the sitting of this court, serve the summons upon the within-named parties to serve as petit jurors, by reading to them, excepting the following named parties, to wit, George W. Piper, Dennis O'Brien, and William Wakefield, who were served by leaving a true copy of the within writ with some person of suitable age, at their last usual place of residence in said county, and also excepting
60 Abel Dunham, who cannot be found in said county.

"AZRO A. STONE,
"*Sheriff of Nicollet County, Minnesota.*"

4th. An entry in the records of said court as to the return of said venire, which entry is as follows: "And on the same day (November 4th, 1867) venire facias for petit jurors returned as follows, to wit:"

Then follows the return of the sheriff to said writ above set forth in full.

The counsel for the State then called as a witness—

A. R. McGill, who being duly sworn, testified as follows:

I am the clerk of this court and was at the time of the drawing of the petit jury for this term of this court.

Question by the State. Will you state the manner in which said jury was drawn, who drew the same, and who was present at such drawing?

The counsel for the defendant objected to the question, on the ground that it is incompetent to contradict the record made of such drawing, or to vary or explain the same. That such record is the best evidence of its contents and cannot be changed by parol.

The court overruled the objection, and the witness stated that
61 the jury was drawn by himself from the jury-box containing the names selected by the county commissioners. That the box was shaken after the drawing of each name. That such drawing was done in the presence of the sheriff of this county and a justice of the peace. That the sheriff and justice of the peace took no part in the drawing of such jury, except to witness the same. To which ruling and decision of the court, and evidence taken under the same, the defendant duly excepted.

The court then overruled the said challenge, and the defendant duly excepted to the ruling and decision of the court.

A jury of twelve men was then empaneled and sworn in the said case, and the State called and swore a large number of witnesses in support of the charge made in said indictment. The evidence on the part of the State established the fact that at New Ulm, in the county of Brown and State of Minnesota, on the 25th day of December, 1866, Alexander Campbell, the person named in the indictment, and one George Liscom, were arrested at the saloon known as the National Hall Saloon, in the town of New Ulm, by the sheriff and other officers of said county of Brown, and taken to and confined in the jail of said county, which said jail was but a short distance from said saloon. That at the time the said
62 arrest was made, a report was very generally circulated through said town to the effect that two half-breeds had murdered John Spinner. That in about twenty-five or thirty minutes after the same was first circulated, a large crowd of over one hundred men, very much excited, assembled at said jail. That great noise and confusion prevailed in said crowd, and the prevailing cry of said crowd was: "Bring out the half-breeds;" "Hang the half-breeds;" "Out with the Indians." That one of the said witnesses for the State, to wit, George Schneider, testified that the crowd called out that Campbell was the brother of the half-breed

Campbell whom the people had recently hanged at Mankato for murdering white people.

That the defendant, John Gut, arrived at the jail after the said crowd had principally assembled there, and about the time the said crowd broke open the said jail, and brought out the said Campbell. That said Gut had no knowledge of the purpose of said crowd in assembling at said jail, until after his arrival there; and all he learned concerning the intention and purpose of said crowd was from the outcry of said crowd, and what he saw after his arrival at said jail.

That when the defendant, Gut, was reproved by the witness for stabbing the prisoner, he replied: "These two half-breeds killed my
63 best friend (meaning John Spinner) and I will kill them. Let me alone or I will stab you." That said crowd did break open said jail, and did take out said Campbell, and did hang him by the neck until he was dead; and that said defendant, John Gut, did participate in the doings of such crowd, by stabbing said Campbell with a knife, both before and after he was hanged by said crowd. That said Campbell and Liscom, before they were arrested in said saloon, were dressed as follows: Said Campbell had on his head a hood, made of dark blue cloth or blanket, such as is worn by the Sioux Indians.

That one of the said parties, either Campbell or Liscom, had on moccasins. That both said Campbell and Liscom wore belts on the outside of all their clothing, in which belts were knife-sheaths; and when seen at said saloon by the State witnesses, they had their knives in their hands. It also appeared from the testimony, that the said Alexander Campbell was of light complexion, though browned in the face from exposure to the weather; that he was naked when taken out of the jail and stabbed and hanged, except that he wore or had on part of a shirt about his shoulders; that his skin (save that upon his face) was as white as
64 that of ordinary white men; that he wore a short beard; that at the saloon said Campbell and Liscom spoke in both the Sioux and the French tongues, or a kind of jargon which the witness supposed to be in those languages; and also spoke the English language.

That the whole time, from the said arrest until said Campbell and Liscom were killed by said crowd at said jail, did not exceed thirty minutes. That when being brought out of said jail by said mob, their faces were very bloody and dirty.

A great deal of other testimony was given by the State, in support of the said charge in said indictment, which it is unnecessary to state in this bill of exceptions in order to present the questions raised on said trial.

The defence having interposed the plea of insanity, together with the plea of not guilty, several witnesses were called and sworn on that point, both medical and other witnesses, and they testified to many facts material to the establishment of the insanity of the said defendant, John Gut, both before and at the time of the killing of said Campbell.

The defence also showed by proof that the said John Gut had been drinking, and was to some extent intoxicated, on the said 25th day of December, 1866, when the said Campbell was killed. It appeared
65 by the testimony of Dr. Alfred Muller, who was sworn on the part of the defendant, John Gut, to establish his insanity, that the witness was post-surgeon of Fort Ridgely, and a physician and surgeon of many years' standing and practice; that said Gut was, in the year 1866, and before the 25 day of December of that year, a soldier in the U. S. Army, stationed at Fort Ridgely aforesaid.

That said John Gut was on one occasion brought to the hospital of

said fort, which was in the charge of said witness as surgeon and physician, for medical treatment by said witness. That said Gut was brought to said hospital by several of his fellow-soldiers. The following question was then asked the said witness by the counsel for the defence:

Question. What report was made to you by the party, John Gut, and those who brought him, as to his condition, and why they brought him to the hospital?

The counsel for the State objected to so much of the question as calls for what the parties other than John Gut reported as to his prior conduct.

The objection was sustained by the court, and the evidence excluded. To which ruling and decision of the court, the defendant duly excepted.

66 The witness, Dr. Alfred Muller, also testified that Edward Brooks, Frederick Seitz, and William Elliot were, at the time of the preliminary examination of the charge made in this indictment against said defendant, John Gut, was in progress before Justice Roos in New Ulm, soldiers in the United States Army, stationed at Fort Ridgley, in this State; and that said Brooks, Seitz, and Elliot, and that they went away from the fort to testify on said examination; and so far as the witness knew, said Brooks, Seitz, and Elliot are now in the United States Army, stationed at Fort Ransom, in the Territory of Dakota, and have been there for several months prior to the sitting of this court.

A witness for the defence, named Francis Bongall, swore that these persons left Fort Ridgley to go to Fort Ransom.

The defence then offered to read in evidence what he represented to be the depositions of the said three witnesses, taken before the magistrate on said examination; it appearing that the State was represented at said examination by its attorney general, and cross-examined said witnesses; the said depositions so offered to be read in evidence, being then on file in this court, and purporting to be duly signed by the said witnesses, and certified to by the examining magistrate, and returned to this court by him.

67 The evidence so offered was objected to by the counsel for the State as incompetent, and that there is no proper foundation laid for it; and the objection was sustained by the court, and the evidence excluded.

To which ruling and decision of the court the counsel for the defendant duly excepted.

The defendant then offered to prove by Charles S. Bryant and Alonzo Lee, two witnesses called and sworn by the defendant for that purpose, the following facts, to wit:

1st. That at the time of the killing of Alexander Campbell, the person named in the indictment in this action, there existed a state of war between the United States and the Sioux tribes of Indians, which tribe or nation is composed of Indians and half-breeds, the actual theatre of which war was the State of Minnesota, and particularly the western frontier of said State; that many of the half-breeds of said tribe were engaged with said tribe in open hostilities against said United States, and were at war with said tribe against said United States.

2d. That the State of Minnesota, through its legal authorities, offered rewards for the killing by any person of any male of said tribe, which offer was then in full force. That the said Campbell and one

68 Liscom came into the town of New Ulm, on the day said Campbell was killed, from the western frontier of this State. That said Campbell and Liscom were then and there dressed in the garb of half-breeds of said tribe of Indians, spoke the language of said tribe and

danced the war and other dances of said tribe, and then and there killed John Spinner, a citizen of the United States, and resident of the town of New Ulm, Brown County, Minnesota.

3d. That the mode of warfare of said tribe of Indians and half-breeds, was, and is, by small bands or parties of said Indians and half-breed, making incursions into the frontier settlements and killing single persons or families.

4th. That the parties who killed said Campbell, including this defendant, were then, and now are, citizens of the United States, and then believed said Campbell to be an Indian or half-breed of said tribe of Sioux Indians so at war with the United States as aforesaid, and then and there engaged in such war in the killing of said Spinner, and the killing of said Campbell was from no other motive whatever.

Def't, together with said offer of proof, offered, in regard to that portion of proposition number 2 which refers to a reward offered by the authorities of the State for the killing of Sioux Indians, an authenti-
ticated copy of General Orders No. 41 and 44 of the adjutant
69 general of the State of Minnesota, in which orders said reward is offered.

To each and every fact so proposed to be proven by the defence the counsel for the State objected on the ground that the same are immaterial, irrelevant, and incompetent.

Which objection was sustained by the court, and the said evidence was excluded.

To which ruling and decision of the court the counsel for the defendant duly excepted.

The defence introduced more evidence, but none that is material to the presentation of the points of exception raised by this bill of exceptions. The court charged the said jury, as follows:

"If several persons conspire or unite together to break open a public jail and to take therefrom by force a person confined therein for the purpose of hanging him, and enter upon the execution of such design by forcibly removing the jailor, breaking open the jail, and removing the person or persons so confined, and death ensues to such confined person in the prosecution of such design, it is murder in the first degree in all who are present aiding or abetting in the unlawful enterprise; and if the jury find in this case that the deceased, Campbell, was, on the 25th
day of December, 1866, confined in a cell in the jail in New Ulm,
70 and that such jail and said Campbell were then in the charge of the sheriff of Brown County, or any of his deputies, and that while so confined, a mob of persons collected together at said jail, and forcibly removed the sheriff or his deputies in charge, broke open the cell where Campbell was confined, and took him therefrom for the purpose of killing him; that death ensued to said Campbell by reason of injuries then and there inflicted by some of the persons engaged in such mob, and that defendant Gut joined such mob, while they were carrying out their design, and participated in their proceedings, by stabbing Campbell, or otherwise aiding them, then the jury must find him guilty of murder in the first degree, whether he inflicted the mortal wound or blow, or did the particular act which produced the death or not, provided the defendant was not at that time insane."

To which charge the defendant did duly except.

The court also charged, as follows:

"If the jury find the existence of such an unlawful assembly as is mentioned in the last preceding charge, and that Gut joined it, and participated in its act, the fact (if it be proven) that he may have heard at the time that Campbell was a half-breed, and that he had killed

71 one Spinner, even though he believed it to true, cannot be taken into consideration by the jury, either as justifying or excusing his act, nor as legal provocation sufficient to reduce the grade of the crime from murder to manslaughter in any of its degrees."

Defendant duly excepted.

The court also charged the jury as follows:

"If the defendant has an insane delusion on any one subject, but commits crime in some other matter not connected with that particular delusion, he is equally as guilty as if he had no insane delusion, and was perfectly sane."

To which charge the counsel for the defendant duly excepted.

The court also charged, that the defendant is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offence he had capacity sufficient to enable him to distinguish between right and wrong as to the particular acts charged, and understood the nature and consequences of his act, and had mental power sufficient to apply that knowledge to his own case.

The court, in commentating to the jury upon the meaning and application of this rule, said to them that whether the defendant Gut, at the time of inflicting the blows upon the body of the deceased, knew
72 that the natural or necessary consequences of his acts was to produce the death of the deceased, might be taken into consideration by them in determining whether he knew or understood the nature and consequences of his acts.

To these comments by the court the defendant, by his counsel, duly excepted. The court also charged the jury as follows:

"That to reduce the crime of killing a human being from murder in the first degree to manslaughter, the provocation must be such as to excite a man of ordinarily cool, candid, and rasonable disposition to the heat of passion."

To which charge the counsel for the defendant duly excepted.

The court also charged as follows:

"That if sufficient provocation exists, and passion does not, it is still murder in cases where the killing is intentional."

To which charge the counsel for the defendant excepted.

The court also charged the jury as follows:

"If the defendant killed Campbell under the mistaken idea and belief that he was that the outcry of the mob, and the circumstances of the case indicated and led him to believe he was, the responsibility of the prisoner in the law is the same as if those facts had been true, or had existed as he believed them to be; and that had the facts and
73 circumstances been, as he supposed, the homicide would have been neither justifiable nor excusable, and that a belief, on the part of the prisoner arising from ignorance of the law of the land, that he had a right to kill the deceased under the circumstances, as he supposed them to exist, would not avail the prisoner either in justification or extenuation of his offence."

To which charge the counsel for the defendant duly excepted.

The court also, on the request of the defendant's counsel, charged the jury as follows:

"If the jury find from the evidence that the defendant, at the time of the killing of Campbell, was so drunk from the use of intoxicating liquor—not drunk with any view to the commission of the said crime—as not to know what he was doing, then the jury cannot rightfully convict him of the charge in the indictment;" but in modification or limitation of the foregoing charge the court instructed the jury:

"That where the act of killing is unequivocal and unprovoked, the

fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime. But where
74 the circumstances are such as to raise the question whether the act was the result of design, or the impulse of sudden passion, the intoxication of the accused is a proper subject of consideration. That drunkness may be taken with consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger, excited by the previous provocation; and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. With regard to the intention, drunkenness may, perhaps, be adverted to according to the nature of the instrument used. If a man use a stick you would not infer a malicious intent so strongly against him, if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous weapon is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent. That he, who is in a state of voluntary intoxication, should be subject to the same rule of conduct and the same legal inferences as the sober man; but that where a provocation has been received, which, if acted upon instantly, would mitigate the offence of a sober man; and the question
75 in the case of a drunken man is, whether that provocation was in truth acted upon. Evidence of intoxication may be considered in deciding that question; but that, in this case, there is no proof of such a provocation."

To this modification or limitation of the instruction requested by the defendant, and given by the court, the defendant's counsel duly excepted.

The counsel for the defendant then requested the court to charge the jury as follows:

1st. That a state of war existed between the United States and the Sioux tribe or nation of Indians, on the 25th day of December, 1866.

The court refused so to charge, and the counsel for the defendant duly excepted.

2d. That it was lawful for any citizen or resident of the United States to kill any male member of said tribe or nation of Indians whenever or wherever found engaged in actual hostilities against the United States or the people thereof.

The court refused so to charge, and the counsel for the defendant duly excepted.

3d. That if the jury find from the evidence that the deceased, Alexander Campbell and George Liscom, by their dress, speech, and acts afforded reasonable and sufficient grounds to induce the people,
76 including the defendant, who killed said Campbell, in the exercise of a reasonable prudence, to believe that they were members of said tribe of Sioux Indians engaged in actual hostilities against the United States and the people thereof, and the persons who killed said Campbell did so believe when they killed said Campbell, and did kill said Campbell for that reason, and under that belief and no other, then such killing is not criminal, and the defendant must be acquitted.

The court refused so to charge, and the defendant's counsel excepted.

4th. If the evidence is not sufficient to fully satisfy the jury of the sanity of the defendant at the time of the commission of the offence, but leaves slight doubts in their minds of his sanity, they should find the defendant insane, and acquit on that ground.

The court refused so to charge, and the defendant's counsel duly excepted.

But the court did charge on this point that insanity was a defence, and must be made out from the evidence to the satisfaction of the jury as any other defence.

5th. If the jury find from the evidence that the defendant had no design or intention of killing, or of aiding or abetting in the killing,
77 of Alexander Campbell, named in the indictment in this action, but was acting under a mistake, occasioned by the appearance and conduct of the said Campbell, which led the defendant to believe said Campbell to be one of a tribe of Indians at war with the United States, the jury must acquit the defendant.

The court refused so to charge, and the defendant's counsel duly excepted.

6th. If the jury find from the evidence that the defendant had no design or intention of killing Alexander Campbell, the person named in the indictment in this action, or of aiding or abetting in the killing of said Campbell, but was acting under an insane delusion that said Campbell was one of a tribe of Indians at war with the United States at the time of said killing, he must be acquitted.

The court refused so to charge, and the counsel for the defendant duly excepted.

7th. That sanity or sound mind is an essential element in the commission of crime, and, in order to convict the defendant of any crime, the jury are bound to find that the defendant, at the time of the killing of Campbell, was sane or of sound mind beyond a reasonable doubt.

The court refused so to charge, and the defendant's counsel duly excepted.

78 The jury then retired, and, after deliberating upon the evidence, returned into court, and rendered the following verdict:

(Copy verdict.)

"We, the jury, find a verdict of guilty, with a recommendation of the clemency of the court.

"WILLIAM DELLAUGHTER, *Foreman.*"

And upon the first day of February, A. D. 1868, the said court did, upon said verdict, render the following judgment, to wit:

"The judgment of this court is, that the defendant, John Gut, be taken from here to the common jail of the county of Nicollet, and there confined until Friday, the third day of April, 1868, on which last-named day he shall be taken from said jail to the place of execution, and between the hours of ten o'clock in the forenoon and two o'clock in the afternoon he be hanged by the neck until he be dead."

And because many of the above matters do not appear of record in the said action, the judge who tried said case has, on this seventh day of February, 1868, duly allowed and signed this bill of exceptions, or case, and ordered the same to be made of record as the law provides.

79 State of Minnesota, district court, Nicollet County.—Horace Austin, presiding judge.

I, A. R. McGill, clerk of the district court in and for the county of Nicollet, Minnesota, do hereby certify that I have carefully compared the foregoing bill of exceptions with the original on file in my office, and that it is a true and correct copy thereof.

In testimony whereof, I have hereunto set my hand and seal, at St. Peter, in said county, this 31st day of March, A. D. 1868.

[SEAL.] A. R. McGILL,
Clerk of said Court.

(Endorsed as follows:) Filed April 8th, 1868.
SHERWOOD HOUGH, *Clerk.*

80 Supreme court.

JOHN GUT, PL'FF IN ERROR,
ag't
THE STATE OF MINNESOTA, DEF'T IN ERROR. } Assignment of errors and prayer for reversal.

The pl'ff in error, John Gut, assigns as error in the foregoing record, in the above-entitled action, that the act of the legislature of the State of Minnesota, passed March 9, 1867, involved therein and therein referred to, is an ex post facto law, and void; and he prays that the judgment of the supreme court of the State of Minnesota, rendered in said action, may be reversed.

ATWATER & FLANDRAU,
Att'ys for Pl'ff in Error.

81 STATE OF MINNESOTA,
Supreme Court, ss:

I, Sherwood Hough, clerk of said court, do hereby certify that I have carefully compared the within and foregoing copy with the original record and judgment roll in the within-entitled action, remaining on file and of record in my office, and that the same is a true and authentic transcript thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said supreme court, at the capitol in the city of St. Paul, this 19th day of August, A. D. 1869.

[SEAL.] SHERWOOD HOUGH, *Clerk.*

[Five-cent internal revenue stamp, canceled]

(Indorsed:) Supreme Court of the United States. John Gut, pl'ff in error, vs. the State of Minnesota, def't in error. Return to writ of error. Chas. E. Flandrau, attorney for pl'ff in error.

(Indorsement on record:) Minnesota supreme court. No. 331. John Gut, plaintiff in error, vs. the State of Minnesota.

Filed 7th December, 1869.

SUPREME COURT

OF THE

UNITED STATES.

JOHN GUTT, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

ARGUMENT OF THE PLAINTIFF IN ERROR.

We bring before this Court one question, and that is, whether the act of the Legislature of the State of Minnesota under which the Plaintiff in Error was indicted and tried is an *ex post facto* law, and as such in conflict with the tenth section of the first article of the Constitution of the United States, which forbids the passage of such laws by the States.

In order to present this question, we will recite in this argument such parts of the law of the State of Minnesota as were in force at the time of the commission of the offense charged in the indictment in this action, regulating the rights of the defendant as to the place where he should be indicted and tried. The Court will see from the indictment that the crime charged was committed on the 25th day of December, 1866, at the county of Brown and State of Minnesota. We claim that he could only be indicted by a grand jury of that county, and be tried by a petit jury of that county, as the law stood at the time of the commission of the offense; and that any law passed subsequently authorizing the grand jury of any other county to indict him, or the petit jury of any other county to try him, is necessarily an *ex post facto* law.

The statutory provisions governing this subject in force at the date of the commission of the offense, are as follows:

[*Revised Statutes of* 1866, *page* 636, § 1.]

"A grand jury is a body of men, not less than sixteen nor more than "twenty-three in number, returned at stated periods from the citizens "of the county before a court of competent jurisdiction, chosen by lot, "and sworn to inquire of public offenses *committed or triable in the* "*county.*"

[*Same Statutes, page* 638, § 27.]

"The grand jury shall have power, and it is their duty, to inquire into "all public offenses committed or triable in the county, and to present "them to the court, either by presentment or indictment, as provided in "the next section."

[*Same Statute, page* 639, § 37.]

"The grand jury shall inquire—

"1st. Into the condition of every person imprisoned on a criminal "charge, triable in the county, and not indicted;

"2d. Into the condition and management of the public prisons in the "county; and

"3d. Into the willful and corrupt misconduct in office of public "officers of every description in the county."

[*Same Statute, page* 515, § 5. *Oath of Grand Jury.*]

"You and each of you do solemnly swear that you will diligently "inquire and true presentment make of all public offenses committed "or triable within this county," &c., &c. The balance of the oath is irrelevant.

The sections of the statute above quoted clearly define the powers and duties of a grand jury in this State at the time of the commission of this offense, and limit its action to the indictment of only such offenses as were committed or triable in the county for which such grand jury is convened.

We will now quote such parts of the law as declared what crimes were triable in the county where they were committed, and what were triable elsewhere.

[*Same Statutes, page* 654, § 1.]

"All criminal causes shall be tried in the county where the offense "was committed, except where otherwise provided by law," &c., &c. The rest of the section is upon the subject of the change of venue, and is not relevant.

The only instances where crimes may be tried in counties other than the one in which they are committed, are found in the *same statutes, at page* 647, §§ 19, 20, 21 and 22. They are exceptional cases, such as crimes committed on board of vessels on a voyage through several counties, on or within one hundred rods of a county line; or where a wound is given in one county, or poison administered, and death ensues in another. In these cases the trial may be had and the indictment found in either county, and these cases are the ones referred to in the sections above quoted by the words committed "*or triable*" in the county. It will not be pretended that this case falls within any of them.

There is one other section of the statute bearing upon the subject, which we will quote:

[*Same Statutes, page* 646, § 10, *subdivisions* 2 *and* 4, *in reference to the sufficiency of the indictment.*]

"The indictment is sufficient if it can be understood therefrom.

"2d. That it was found by a grand jury of the county in which the court was held.

"4th. That the offense was committed at some place within the "jurisdiction of the court, except where, as provided by law, the act, "though done without the local jurisdiction of the county, is triable "therein."

This is all the statute law in force at the time of the commission of the offense which bears upon the rights of the defendant to be indicted and tried in the county where the offense was committed, and, as we claim, puts that right beyond dispute.

On the 9th day of March, 1867, the Legislature of this State passed the following act:

"An Act to change the titles of and regulate the holding of courts for "counties unorganized for judicial purposes, and to regulate the manner "in which the counties to which they are attached for such purposes are "to provide for the transaction of business of counties which have no "county commissioners.

"*Be it enacted by the Legislature of the State of Minnesota*:

"SECTION 1. In all cases where one or more counties are attached to "another for judicial purposes, the title of the district court for such "counties shall hereafter be: The State of Minnesota, District Court for "such judicial district, counties of ——— and ——— (naming all the "counties for which a common place for holding terms of the district

"court is by law provided), and the clerk of the district court, sheriff,
"and county attorney of the county in which such court is held, shall
"perform the duties in said court that would have devolved upon them
"respectively had it been a court held exclusively for such county.

"SEC. 2. On the first Monday of April, A. D. eighteen hundred and
"sixty-seven, and in January of each year thereafter, the board of county
"commissioners of each of the several counties of this State which are
"now by law attached to another county for judicial purposes, shall meet
"and select persons properly qualified for grand jurors and petit jurors,
"and the number of such persons so selected in each county, and all
"proceedings in the selection of the same, and in the making, signing,
"attesting and delivering of the lists thereof, and in the drawing and
"summoning of grand and petit jurors for such term of the district
"court for such counties, shall conform to the regulations now provided
"by law, except that the lists of persons suitable for grand and petit
"jurors selected in each county shall be delivered to the clerk of the
"district court of the county in which such court is held, and that the
"grand jurors shall be drawn by the said clerk from all the names
"returned by the several counties collectively as those of persons suit-
"able for grand jurors, and that the petit jurors shall in like manner be
"drawn from the names of those in like manner returned as those of
"persons suitable for petit jurors; and except also that the sheriff of
"the county in which such court is held, or his deputy, shall officiate in
"the summoning of the jurors so drawn, in the same manner that he
"would be required to do provided said court was held exclusively for
"his own county: *Provided*, That in case any counties included within
"the provisions of section one of this act have no board of county com-
"missioners, the board of county commissioners of the county in which
"such court is held shall select suitable persons from such counties for
"grand and petit jurors, and the same shall be selected and lists of them
"made, signed, attested and delivered as provided above.

"SEC. 3. No action or proceeding, civil or criminal, now pending or
"undetermined in any court the title of which is changed by the pro-
"visions of this act, shall be deemed to be affected or impaired in any
"manner by such change, but all subsequent proceedings therein shall be
"conducted and carried on in said court in the same manner as if such
"action or proceeding had been commenced in said court after the title
"thereof was changed; and said court shall also have the same civil and

"criminal jurisdiction over all the counties for which it is held that it "would have had provided its title had not been changed.

"SEC. 4. The judge of any district court, the title of which is "changed by the provisions of section one of this act, may, whenever he "shall consider it to be in furtherance of public justice or for the public "convenience, order that the place for holding such court may be "changed from the county now designated by law as the one in which "such court shall be holden to one of the other counties embraced in the "title of such court, and in such case all the papers, records, books and "other property appertaining to said court shall be delivered to the clerk "of the district court of the county in which by the terms of said order "the said court is thereafter to be holden, upon the demand of the said "clerk; and all general and special terms of said court shall thereafter "be holden in the county designated in said order for the holding of the "same, and the jurisdiction of the court in any action or proceeding "pending at the time of the making of said order, or over any crime, "misdemeanor or offense committed either before or after the making of "such order, shall not in any way be affected thereby: *Provided*, That "the said judge may at any time, when he shall deem it expedient, again "in like manner change the county in which such court shall be holden.

"SEC. 5. In case there is no clerk of the district court in the county "to which the holding of the court is changed, as provided for in the "preceding section, there shall be deemed to be an original vacancy in "the office of the clerk of the district court for such county, which "vacancy shall be filled in the same manner and subject to the same "qualifications and regulations as are now by law provided for filling "vacancies in the office of clerk of the district court.

"SEC. 6. All prisoners committed for trial for any offenses in any "county within the jurisdiction of such court shall be delivered to the "keeper of the common jail of the county in which said court is holden "for safe-keeping, and to be produced when called for in the said court.

"SEC. 7. The expenses of all criminal actions and proceedings shall "be charged to and be defrayed by the county in which the crime is "charged to have been committed.

"SEC. 8. In case any of the counties included in the provisions of "this act shall have no board of county commissioners, then the board "of county commissioners and all the county officers of the county in

"which such court is holden shall act as the board of commissioners and "county officers of such counties in the same manner, and returns from "said counties shall be made to and through such officers in the same "manner as is now required to be done in fully organized counties: "*Provided*, That such board of commissioners shall not have power to "levy any greater tax upon said counties than is sufficient to provide for "the expenses thereof, including the laying out, opening and improving "of roads and building and repairing of bridges therein.

"SEC. 9. This act shall take effect and be in force from and after its "passage.

"Approved March 9, 1867."

Under this act the Judge made the order convening the court at Redwood county, where the defendant challenged the grand jury on the grounds, among other things, as follows:

"That the law under which this present court is held, and the grand "jury summoned, is unconstitutional so far as it attempts to authorize "any inquiry into, indictment or trial of offenses committed in the "county of Brown, and without the county of Redwood."

These matters are all set out in the bill of exceptions returned to this court. The objection or challenge was overruled, and the defendant excepted.

The court will see that the effect of this law was to take the defendant from the county of Brown to the county of Redwood for indictment and trial, which could not have been done at the time of the commission of the offense, and depends for its validity entirely upon a law passed after the commission of the offense.

The Supreme Court of the State of Minnesota has decided in this case that this law of March 9, 1867, is not an *ex post facto* law. The case is reported in 13 *Minn. Reps.*, *page* 341, and the decision is placed generally upon the ground that it "neither directly nor indirectly aggravates or "changes either the crime or the punishment; nor does it alter the rules "of evidence, or receive less or different testimony than was required at "the time of the commission of the offense in order to convict the "offender."

We contend that the law may not be obnoxious to any of these objections, and still be plainly an *ex post facto* law. Various decisions have been made upon such laws, and numerous definitions of an *ex post facto*

law have been given in the State courts and in the courts of the United States; but it will be observed that none of these courts, in defining what does make a law *ex post facto*, decide that no other feature than those they mention will produce that effect. Chief Justice Marshall defines an *ex post facto* law to be one "which renders an act punishable "in a manner in which it was not punishable when it was committed." *Flitcher vs. Peck*, 6 *Cranch* 87. This we think is the most comprehensive of all the definitions which have been given, and includes all the others which have been more elaborately stated by other judges in other cases—for example, that of Justice Chase in *Calder vs. Bull*, 3 *Dallas* 386, where, among other things, he says: "Every law that alters the legal rules of "evidence, and receives less or different testimony than the law required "at the time of the commission of the offense, in order to convict the "offender," *is ex post facto*. He adds: "All these and *similar laws* are "manifestly unjust and oppressive." We will not multiply citations of definitions on this point, but endeavor to show that the law in question comes directly within the definition of Chief Justice Marshall above cited, as rendering the crime charged in the indictment punishable in a manner in which it was not punishable when it was committed. And we go farther, and claim that this law of March 9th, 1867, is more particularly of the class of laws which the framers of the constitution had in mind when they prohibited the passage of *ex post facto* laws than any that have received judicial condemnation since the passage of that instrument.

In framing the constitution, those abuses which had been perpetrated by the British government upon her subjects were the ones which the framers most particularly directed their prohibitions against, and they intended to prevent the recurrence of them in the free government they were establishing.

Frequent instances in English history had occurred where, contrary to the common law of the country, the government had, by act of parliament, created special commissions to try offenders at some particular place for offenses committed in any county in the kingdom. These commissions were simply "organized to convict," and always succeeded. The defendant was dragged away from the *vicinage* to some remote and unfriendly region, and thus deprived of his most sacred common law and constitutional rights, and against his protest was immolated.

The proceedings in England which followed the Rebellion of 1745, by which distinguished men were unlawfully convicted of treason, away from the county where the offense was committed, was fresh in the minds of the framers of the constitution, and a citation of this one instance, of then recent occurrence, should be sufficient to satisfy the Court that the prohibition concerning *ex post facto* laws was directed more particularly against changing the venue or place of trial of offenses, than to any other element that enters into legislation and renders laws *ex post facto*.

After this rebellion, parliament passed an act establishing a special commission for the trial of all who took part in it, and authorized the court to try them in any county in England. The court sat in July, 1746, at St. Margaret's Hill, in the borough of Southwark, in the county of Surrey, and tried and convicted many of the prisoners who had surrendered to the Duke of Cumberland, at the siege of Carlisle, in a distant part of the kingdom. The question of jurisdiction was raised, but Chief Justice Lee, who presided, held the jurisdiction complete under the act of parliament. An account of this affair may be found in *Lord Campbell's Lives of the Chief Justices*, vol. 2, page 221. The Declaration of Independence had very recently been promulgated, setting forth the grievances of the colonies as good cause of war. None were more prominently dwelt upon than the very one which we complain has been inflicted upon the defendant by this law of March 3, 1807, to wit: Depriving him of his right, secured by common law and statute, of being indicted and tried in the county where the offense was committed.

The language used in the Declaration in expressing this abuse of power by the crown is as follows:

"He has combined with others to subject us to a jurisdiction foreign "to our constitution and acknowledged by our laws, giving his assent to "their pretended legislation."

"For depriving us in many instances of the *benefits* of trial by jury."

"For transporting us beyond seas to be tried for pretended offenses."

All of which were nothing more than the dragging of men away from the county where offenses were committed to be tried elsewhere.

They had before them the Declaration of Rights, which had recently been promulgated by the Colonial Congress, October 14, 1774, in which it was resolved as follows:

"That the respective colonies are entitled to the common law of Eng-"land, and *more especially* to the great and inestimable privilege of being "tried by their peers of the *vicinage*, according to the course of that "law."

Journal of Congress, Declaration of Rights of Colonies, Oct. 14, 1774, *pages* 27 *to* 31. *Also cited in note* 1, *to section* 158, *of Story on the Constitution.*

They also had before them the constitution of Massachusetts, which declares that "in criminal prosecutions the verification of the facts *in* "*the vicinity where they happen*, is one of the greatest securities of life, "liberty and property of the citizen."

Commonwealth vs. Porter, 2 *Pick* 550.

The word "vicinage" means, at common law, county. *Bouv. Law Dic., Burrill's Law Dic.*, 3 *Black's Coms.* 294.

Why, we ask, is any law held to be *ex post facto?* The answer is, simply because it changes the rights of the accused from what they were at the time of the commission of the offense, to his detriment. Now, the right to be indicted and tried in the county where the offense was committed was held sacred at the common law. It has been particularly singled out in all the great declarations of right to which we have called attention, and which were made before the Constitution of the United States. Why, then, we ask, is it that this right, which has been so prominently recognized, can be legislated away at pleasure, retrospectively, when a mere change in the degree of punishment, or in the degree of evidence necessary to convict, by retrospective legislation, can not stand for a moment before judicial inquiry? It is a very narrow view of the subject, indeed, which will condemn a lesser grievance and tolerate a greater one. Some courts rarely look beyond precedent for the rule of their decision, but we expect better things of this, the highest tribunal in the land. We expect, where a case falls within a principle, the principle will govern, and, if no precedent can be found exactly on the point involved, the Court will, by a recognition of the principle, furnish a precedent for the future. The right we contend for in this case is infinitely of more importance than any one which has ever heretofore been invaded by *ex post facto* legislation. It is fundamental, and involves all other rights; and if this power is tolerated and admitted to exist in State or Federal government, then all persons charged with crime

are left entirely at the mercy of those governments, and may in all cases be convicted or acquitted, at the pleasure of the State, by being transported into a friendly or a hostile community for indictment or trial.

It is quite clear that the Supreme Court of Minnesota decided that this law was not *ex post facto* simply on the ground that they could not find a precedent of a similar law which had been held void. The court did not discuss the principle involved, but merely said that the law was not similar to any of those which had been held void, and was therefore valid. The absence of decision on this point is easily accounted for on the ground that no legislative body ever before attempted so bold an outrage upon the secured rights of the citizen. We think it is the first law of the kind that was ever passed since the formation of the Republic; and had it occurred in its early history, when the principles upon which its constitution is based were more familiar, and the abuses of the crown which called into action those principles were fresh in the minds of men, it would have fallen before the courts without argument.

The decision of the Supreme Court of Minnesota is more remarkable from the fact that it had before it the special message of the Governor of the State recommending this legislation particularly to meet this case, which this Court has not, unless it can take judicial notice of such message, as it does of the laws of the State.

We have shown that our right was fixed to be indicted and tried in Brown county by common law and statute. We have also shown that it was a more valuable right than any other touching the trial of the offense with which we were charged; and we have also shown that we have been legislated out of that right by an act passed after the commission of the offense. Having shown these premises, we think we establish the conclusion that such law was *ex post facto*, unjust, oppressive and void.

It will be urged in answer to this argument that there were attached to Brown county, at the time of the commission of the offense, for judicial purposes, the counties of Cottonwood, Murray, Pipestone and Redwood; that the jury which sat in the indictment and trial of causes in Brown county, was drawn from lists furnished by all these several counties; and that if the law did change the venue in this case to Redwood county, the defendant would have the same grand jury to indict, and the same petit jury to try him, as he would have had at home;—consequently, he sustains no injury. The court, in its decision, says: "A law changing

"the place of trial from one point in the district to another, cannot, in "principle, be distinguished from a law changing the place of trial from "one point to another in the same county." 13 *Minn. Rep.* 363.

The fallacy of this reasoning must be apparent on the mere statement of it. *First.* Because the statute declared exactly the contrary when it said the party should be indicted and tried in the county where the offense was committed, and not elsewhere—not in any particular part of the county, but *in* the county. Of course, wherever the court sat for the indictment and trial of offenses in that county, there was the place meant by the statute, and that place might be changed to suit the convenience of business.

Second. Because the manner of constituting the juries which are to indict and try the offender is a distinct matter, and has nothing whatever to do with the *place where* he is to be indicted and tried. Supposing the same statutory provisions to exist as to the place of trial that did exist at the time of the commission of this offense, and that the law provided for the drawing of grand and petit juries for all courts from the State at large. Can it be pretended for a moment that, because of this mode of constituting the juries, the prisoner can, by a statute, be dragged off into any county of the State—it may be five hundred miles from his friends and his witnesses—and be placed at the mercy of a hostile community, or be deprived of the power of procuring counsel or witnesses from the increased expense, or be subjected to the many other unfair and oppressive influences that this Court so well knows may and often do exist, to the prejudice of the rights of prisoners, in counties, districts or States remote from their homes, and in which they may be either strangers or enemies to the inhabitants. It was to prevent just such consequences that the place of trial was immutably fixed by statute within the small area of a county.

If this Court, by its decisfon, admits such a power to exist in the government, State or National, it will invest those governments with power to re-enact all the abuses that so largely constituted the grievances of the colonies which separated them from England.

Third. There is another view which sheds light upon this question, and shows that the place whence the jury comes, and the place where the trial is to be held, are entirely distinct, and can have no influence the one

upon the other. The constitution of the State, in *Section* 6, *of Article* 1, provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a "speedy and public trial, by an impartial jury of the county or district "wherein the crime shall have been committed, which county or district "shall have been previously ascertained by law," &c.

The Legislature could have provided under this, that the accused should be tried in a certain district composed of several counties, and that the jury should be drawn from the same district, and the accused could not complain if these districts were ascertained and definitely fixed by law previously to the commission of the crime. But the Legislature did exactly the other thing. It provided that when one or more unorganized counties are attached to an organized county for judicial purposes, the jury shall come from all the counties, but the trial of the offender shall take place in the county where the offense was committed, clearly indicating that those two rights were distinct, and not to be mingled, as they have been by this law of 1867, and the decision of the Supreme Court of this State upon such law.

The same principle runs all through the administration of criminal justice in the Federal courts. The place of trial must be fixed before the commission of the offense, and cannot be changed by legislation afterwards. If Congress should pass an act that an offense which had been committed in Virginia should be indicted and tried in Maryland or the District of Columbia, there can be very little doubt that the law would be an *ex post facto* law and void.

This question may be said to have been practically, if not judicially, settled.

The Court will remember the efforts made to indict and try Jefferson Davis at Washington instead of Richmond, and how the matter was abandoned. The urgency of that case was, in the estimation of the prosecution, the same as in this. They thought it would be easier to convict in Washington than Richmond, as the authorities here supposed they could force a conviction more certainly in any other county than Brown. In the state of feeling which existed at the end of the war, we may readily suppose that Congress would have furnished all the legislation required to indict and try Mr. Davis anywhere that presented the

greatest facilities for conviction, and their failure to do so may be regarded as a decision of some of the best legal minds in the country that they had not the power.

A reversal of this judgment will not set the offenders at large, nor in any way interrupt the course of justice, but will simply set aside a series of unjust and oppressive legislative and judicial proceedings unparallelled in the history of this country; and we ask that this Court will reverse the judgment for the reasons above given.

Respectfully submitted,

E. M. WILSON,
Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

JOHN GUTT, Plaintiff in Error,

vs.

THE STATE OF MINNESOTA, Deft. in Error.

Argument for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

JOHN GUT, Plaintiff in Error,

vs.

THE STATE OF MINNESOTA, Defendant in Error.

Reply of Plaintiff in Error to Points of Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

JOHN GUT, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

REPLY OF THE PLAINTIFF IN ERROR TO THE POINTS OF THE DEFENDANT IN ERROR.

The counsel for the Defendant in Error, in his first point, objects to the jurisdiction of this Court, on the ground that it does not appear from the record that any question has been decided in the State Court which this Court has power to review under the 25th section of the Judiciary Act of 1798.

We think the counsel is not sustained by the record or the authorities in this view. No question has received

more discussion, or more frequent decision in this Court, than the one of how far the record must disclose that a question was decided in the State Court of the character which will confer jurisdiction upon this Court; and the conclusion arrived at is not so broad and absolute as stated by the counsel, but the Court has laid down the rule as follows:

"It is not indispensable that it should appear on the record *in totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the Court below on the very point; but that it is sufficient, if it is clear from the facts stated, by just and necessary inference, that the question was made, and the Court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment."

Crowell vs. Randall, 10 *Peters*, 368.

This case contains a very full review of all the cases decided in this Court up to the date of its decision, showing beyond dispute that the above is the true rule of the Court in judging of its jurisdiction in cases coming from the State Courts.

Owings vs. Norwood's Lessee, 5 *Cranch*, 344.

Martin vs. Hunter's Lessee, 1 *Wheaton*, 304—355.

Miller vs. Nichols, 4 *Wheaton*, 311, 315.

Williams vs. Norris, 12 *Wheaton*, 117—124.

Hickie vs. Starkie, 1 *Peters*, 98.

Wilson vs. The Blackbird Creek Marsh Co., 2 *Peters*, 245, 250.

Satterlee vs. Matthewson, 2 *Peters*, 380, 410.

Harris vs. Dennie, 3 *Peters*, 292, 302.
Craig vs. State of Missouri, 4 *Peters*, 410.
Fisher vs. Cockerill, 5 *Peters*, 256.
Davis vs. Packard, 6 *Peters*, 41, 48.

The above cases are all cited and commented upon in the case of *Crowell vs. Randall* above cited, and show an uniform rule of decision to the following effect :

"That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient that it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment."

Now does it so appear from the record in this case that the point was made that the law of the State of Minnesota of March 9, 1867, was an *ex post facto* law, and that the decision was against that point? We insist that it clearly does so appear.

The point was made distinctly in the District Court in several instances "that the law under which the indict-"ment was found is unconstitutional and void, in author-"izing the indictment and trial of persons charged with "offenses committed before the passage of said act in "counties other than those where the said crimes were "committed."

This point was overruled and excepted to in each

instance when made in the District Court, and appears in the record strictly : to wit, the bill of exceptions.

Of course there were a multitude of other questions raised and excepted to, which were confined to the laws of the State, and were not of the nature to confer jurisdiction upon this Court.

When the case went to the Supreme Court, the highest Court in the State, it was absolutely indispensable that said point should be decided, because the whole validity of the indictment and conviction depended upon that point, and the Court must have decided that the law was not *ex post facto* to have sustained the conviction. So we claim that there is more than a "clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment." It amounts to absolute certainty.

The counsel contends that the objection, as appears from the bill of exceptions, to the constitutionality of the law, had reference solely to the State constitution, because objections were raised that were solely applicable to that instrument. It is true the objection embraced all the points that were involved under both constitutions, as was necessary to save the advantage of them to the defendant. But the Court will see that the Constitution of the United States expressly forbids States to pass *ex post facto* laws in these words : "No State shall * * * pass any bill of attainder, *ex post facto* law," &c. *Art.* 1, *Sec.* 10, *Const. U. S.* And the Constitution of the State of Minnesota contains the same prohibition in nearly the same words, *Art.* 1, *Sec.* 11, provides as follows : "No

bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be passed," &c. Now, when the question is raised that a law is in conflict with the State constitution because it is an *ex post facto* law, it must necessarily involve both constitutions, because, if it *is* an *ex post facto* law, it is passed in violation of the Federal constitution, and there can be no answer to it. It would be mere surplusage to repeat, in stating an objection, that it violated both the State and Federal constitutions, when the nature of the question is such that it cannot violate the one without the other.

We claim, therefore, that it appears in the bill of exceptions that the point was made and decided in the District Court, and that, as the question was fundamental and went to the whole case in a jurisdictional point of view, this Court is bound to infer, from the strict record alone, that the Supreme Court decided the same point in the same way, and for the best of reasons, that the case could not be decided without so doing.

But we further claim that this Court, in this particular case, is bound to look at the points made by the appellant in the Supreme Court of the State, and the opinion filed by that Court in deciding said points; and for this reason, that it is rendered *impossible*, by the peculiar practice of our State, to find out in any other way what points were made in the State Supreme Court, or what decision was made on the points raised. There is no such thing in that Court as an *assignment of errors on the record*. The points that the appellant desires to make, and the authorities in support of the same, are printed and presented

to the Court on the argument, a copy of the same is filed with the Clerk, and another copy furnished the Reporter. The case is argued on these points, and the decision filed. It is impossible to incorporate either the points or the decision, except so far as the latter affirms or reverses the judgment of the Court below, into the record. Therefore there is no way of ascertaining from the record, strictly speaking, what points were decided, except so far as the points made in the lower Court are presented thereby, and the necessary inference is to be drawn as to such points having been decided.

It often, however, occurs that new points are raised in the Supreme Court, or the points made at *nisi prius* are more fully and particularly stated therein. Such was the fact in the case at bar. The point on this law of 1867 being an *ex post facto* law, was stated in the Supreme Court of the State to be in direct conflict with the eleventh section of the Bill of Rights, *Section* 11, *of Art.* 1, *State Constitution*, which prohibits the passage of *ex post facto* laws; and the decision of the Supreme Court on the same was, that said law was not an *ex post facto* law, with all the reasons arrayed to support the same, which decision is reported *vol.* 13 *Minn. Reports, p.* 363.

The object of the judiciary act of 1789 is to give a review to the Federal Courts in all cases where these questions actually arise and are decided in the State Courts, and where the peculiar practice of the State precludes the *possibility* of presenting the points positively by the record, the Court will adopt such means as the practice admits to ascertain what was decided. Any

other course would leave the whole matter of Federal review to the States, and defeat the purpose of the Constitution and laws of the United States, and be a denial of justice. The State Reports are State records, and judicial notice is taken of them in all Courts. We contend that the report of this case is before this Court to show what the State Supreme Court did decide, and the Court must take notice of it, or hold that no case decided in Minnesota is subject to review in the Supreme Court of the United States, where the points are made first in that Court and do not appear in the bill of exceptions from the lower Court.

But we are satisfied that the point was clearly made in the District Court, as appears in the record, and that, as we said above, the Supreme Court of necessity was compelled to decide it, and did decide it, to arrive at a judgment of affirmance.

In regard to the second point made by the counsel for the Defendant in Error, on the merits of the question whether the law of 1867 was an *ex post facto* law, we have very little to say beyond what has been said in our opening brief. He seems to think that the constitutional prohibition does not extend to criminal proceedings. He may be right so far as mere practice in criminal causes is concerned, but we think we have demonstrated that the prohibition was more particularly designed to prevent such an abuse as was contemplated and executed by this act, than to any other character of retrospective legisla-

tion; and that the reason the authorities do not meet the exact point is simply because such an atrocity in legislation was never before perpetrated.

E. M. WILSON,
Attorney for Plaintiff in Error.

Supreme Court,

UNITED STATES.

JOHN GUT,

Plaintiff in Error,

versus

THE STATE OF MINNESOTA,

Defendant in Error.

Points of Defendant in Error.

F. R. E. CORNELL,

Attorney General of the State of Minnesota.

Counsel for defendant in error

St. Paul Press.

Supreme Court, United States.

JOHN GUT, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Def't in Error.

POINTS OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

On the 18th day of September, 1867, an Indictment was found against John Gut, Defendant, and Plaintiff in Error here, in the District Court, Sixth Judicial District, Minnesota, at a general term thereof, then held in and for the counties of Brown, Cottonwood, Murray, Pipestone and Redwood, at Redwood Falls, in said county of Redwood, for the murder of Alexander Campbell, committed on the 25th day of December, 1866, in said Brown county, on which he has since been tried and convicted. The counties of Cottonwood, Murray, Pipestone and Redwood were unorganized counties attached to the county of Brown for judicial purposes, (although this fact does not appear of record.) It does appear, however, from the face of the Indictment, that it was found by a grand jury and presented to a Court acting in and for all these

counties as one trial district, and that the term of said Court at which the Indictment was found, was held in Redwood county, in pursuance of an order of the Judge of said Court changing the place of holding the same from Brown county. It also appears from the record that the Legislature of the State of Minnesota on the 9th day of March, 1867, passed an act entitled "an act to change the titles of and regulate the holding of Courts for the counties unorganized, for judicial purposes, and to regulate the manner in which the counties to which they are attached for such purposes are to provide for the transaction of business of counties which have no county commissioners;" but the record does not disclose any of the provisions of said act.

The counsel for Defendant, interposed a challenge to the panel of the Grand Jury, and among other grounds assigned the following: "That the law under which this present Court is held and the Grand Jury summoned is unconstitutional, so far as it attempts to authorize any inquiry into, Indictment or trial of offenses committed in Brown county and without Redwood county;" which was disallowed by the Court.

On the arraignment of Defendant, he moved to set aside the Indictment on the following among other grounds:

"That the said Indictment is not found and presented as prescribed by the statutes of this State, in this, that the law under which said Indictment was found, is unconstitutional and void, in authorizing the indictment and trial of persons charged with offenses committed before the passage of said act in counties other than those where the said crimes were committed;" and the motion was overruled and excepted to.

The action was tried in Nicollet county on a change of venue, and on the trial being moved, Defendant objected to being tried

on the ground that "said Indictment charges him with a crime alleged in said Indictment to have been committed in the county of Brown, in this State, on the 25th day of December, 1866, and said Indictment shows upon its face that it was found by a Grand Jury of the county of Redwood, sitting in the said county of Redwood, under a pretended law passed subsequent to the commission of said crime, which said law, so far as it authorizes the indictment of crimes committed before its passage in counties other than the one in which the crime was committed, is unconstitional and void." The Court overruled the objection, and the Defendant excepted. A verdict of guilty was found and a judgment of conviction rendered. On appeal to the Supreme Court of the State of Minnesota, the judgment was affirmed.

The foregoing comprise all the facts which appear of record, relating to the question sought to be raised in this Court.

POINT 1.

The Defendant in Error objects to the jurisdiction of the Court in this case, and moves to dismiss the writ of error, because it does not appear from the record, that any question has been decided by the State Court, which this Court has power to review under section 25 of the judiciary act of 1789.

Sec. 25, *chap.* 20, *U. S. Statutes*, 1789.

Upon this question of jurisdiction this Court, in Maxwell & Walker vs. Newbold, et al., 18 How., 511, lay down the rule thus: "It must appear that some point was decided by the State Court which authorizes a review by this Court under the 25th section. To bring that question here, it is not sufficient to raise the objection

here and to show that it was involved in the controversy in the State Court, and might and ought to have been considered by it when making its decision. It must appear on the *face of the record* that it was in fact raised; that the judicial mind of the Court was exercised upon it, and their decision against the right claimed under it." In this case, the Court fully approves the doctrine as settled in Crowell vs. Randall, 10 Peters, 368, concerning which they say, "In that case the whole subject received a careful and deliberate examination, and the doctrine was clearly announced, that, in order to give jurisdiction to this Court, it must appear by the record that one of the questions stated in the 25th section of the act of 1789, did arise and was decided in the State Court, and that it was not sufficient that it might have arisen or been applicable, it must appear that it did arise and was applied; and this rule has been uniformly adhered to since the decision of that case."

In regard to how such question and the decision thereon of the State Court must appear of record, it is settled that they must not only be incorporated in and made a part of the record, but must properly belong to it. In case the question is one of conflict between a State Law and the Constitution of the United States, "such conflict must appear either in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from the exceptions taken from the ruling of the Court."

Per Court, Wayne, J. 14 *How.*, 152. 5 *How.*, 317.

The certificate of the Clerk of the Court, that a motion was made for a new trial, and reasons and certain papers filed on which the motion was founded, which are on the files of the Court, is not

a part of the record; nor do the reasons on the files of the Court become a part of the record by such certificate.

Lessee of Reed vs. Marsh, 13 *Peters*, 153.

So held as to the certificate of a State Court that the validity of State Laws was drawn in question, without specifying what laws, for the reason, that in such case the jurisdiction of this Court would be made to depend upon the opinion or views of the State Court, and for the further reason as the Court say, that "without a statement of the State Statutes, this Court cannot apply them to the subject matter of litigation to determine whether or not they violated the Constitution of the United States."

14 *How.*, 149. 18 *How.*, 516.

Touching the degree of particularity required of a party in stating his point to the State Court, whose decision he seeks to have reviewed in this Court, the rule requires that should be specifically made.

Maxwell vs. Newbold, et al., 18 *How.*, 511.

In ~~this~~ that case, the Court held that a general assignment as error in the State Court, in these words: "That the charge of the Court, the verdict of the jury, and the judgment below, are each against and in conflict with the Constitution and Laws of the United States, and therefore erroneous,"—was insufficient, saying, "that the clause in the Constitution and the law of Congress should have been specified by the Plaintiff in error in the State Court, in order that this Court might see what right was claimed, and whether it was denied to them by the State Court."

In the case at bar, the record does not disclose what points were

made by the Plaintiff in error, in the State Supreme Court, nor upon what points it decided to affirm the judgment of the State District Court.

The bill of exceptions taken and allowed in the District Court and made a part of the record, shows several objections to have been made in that Court, but which of them were urged in the Supreme Court, or passed upon by it, does not appear. Among the questions raised by the Defendant in the District Court, the only ones of a constitutional character, were those made: 1st, in his challenge to the panel of the Grand Jury; 2d, on the motion to set aside the indictment; and 3d, his objection to being tried thereon; in none of which was the point made that any right which he claimed under the Federal Constitution was violated by any State Law.

The ground taken in his challenge to the Grand Jury is, "That the law under which that Court was held and the Grand Jury summoned, was unconstitutional, so far as it attempted to authorize any inquiry into, Indictment or trial of offenses committed in Brown County." This neither states what Constitution—whether State or Federal—nor what clause of either it violated, and whether the law referred to, attempted to authorize any inquiry into indictment or trial of the offenses indicated, the objection and the record are alike silent, and this Court cannot go outside thereof to ascertain the fact.

The Defendant's second objection is, that "The indictment was not found and presented as prescribed by the Statutes of this State, in this," (among other grounds;) "3d, that the law under which said indictment was found, is unconstitutional and void, in authorizing the indictment and trial of persons charged with

offenses committed before the passage of said act, in counties other than those where the said crimes were committed."

The point of this objection clearly has no reference to any violation of the Federal Constitution, but to the State Constitution. The point made is, "That the indictment is not found and presented as prescribed by the Statutes of the State,"—not that the Statutes of the State under which it was found were repugnant to any provision of the Constitution of the United States,—and in specifying wherein it is not in conformity with the Statutes of the State, says, "in this, that the law under which it was so found was unconstitutional," or in other words, not a State Law, and what makes it more clear, that the State, and not the United States Constitution was referred to, is the Defendant's fourth ground of objection on this same point, to wit: "That said law is unconstitutional and void in this; that it embraces two distinct subject matter, only one of which is expressed in the title of said act." (See Bill of Exceptions, folio .) Inasmuch as the Federal Constitution contains no clause on this subject.

The Defendant's third objection was to being tried under the indictment, "on the ground that it charges him with a crime alleged in said indictment to have been committed in the County of Brown, in this State, on, &c.; and said indictment shows upon its face that it was found by a Grand Jury of the County of Redwood, sitting in the said County of Redwood, under a pretended law passed subsequent to the commission of said crime, which said law, so far as it authorizes the indictment of crimes committed before its passage in counties other than the one in which the crime was committed, is unconstitutional and void." (See Bill of Exceptions, folio .)

The assumption of fact in this objection, that the indictment

shows upon its face that it was found by a Grand Jury of the County of Redwood, is unfounded. The indictment upon its face purports to have been found "by the Grand Jury of the counties of Brown, Cottonwood, Murray, Pipestone and Redwood, in the State of Minnesota." (See Bill of Exceptions, folio .)

What the law referred to authorized, or what its provisions are in any respect, is not apparent from the record, and this Court cannot determine.

But the objection assumes, by implication, that the law "authorized the indictment of crimes committed before its passage in counties other than the one in which the crime was committed, and makes the point thereon that the law is unconstitutional." It does not intimate, however, that such unconstitutionality consists in its repugnancy to any provision in the United States Constitution, but must refer to the State Constitution, because the right of being indicted in any particular county for a crime committed against the State, if it exists at all, must be derived under State and not Federal authority.

These objections comprise all there is of the record bearing upon the question before this Court.

Were it allowable, and should this Court so hold in the case at bar, to look outside of the record, and by an inspection of the points actually made and filed by the Defendant in the State Supreme Court, and the opinion of that Court in giving its decision, ascertain what question was then raised and actually passed upon, it would be found that it was one relating solely to the validity of the law in question, under the State Constitution.

First. Defendant's first point in the State Supreme Court was as follows:

"The law under which the Court was held, and the Grand Jury summoned was and is unconstitutional, so far as it authorizes or attempts to authorize the indictment of crimes committed before its passage in counties other than the one where the crime was committed. In this respect it is an ex post facto law, and prohibited by the Constitution of the State. Const., Art. 1., Sec. 11."

Then, after citing several sections of the Revised Statutes of Minnesota, the point proceeds: "The statutory provisions above cited clearly establish the fact that the Defendant could not have been indicted for the crime charged in the indictment under the laws then" (at the time the crime was committed) "in force, by any grand jury, except one sitting in and for Brown County. Nor could he have been tried for said crime without the limits of said county." "Now this Statute" (the law of 1867,) "under the construction placed upon it by the Court below, directly deprives the defendant of both these valuable rights, *secured to him by the constitution and laws of the State*. The law is therefore in direct conflict with the following provisions of the State Constitution: Section 2 of the Bill of Rights, in depriving him of a right secured to him, by other means than the law of the land and the judgment of his peers. Section 6 of the Bill of Rights, which secures to him a speedy and public trial, by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. Section 11 of the Bill of Rights, which prohibits the passage of ex post facto laws."

Second. The opinion of the Court, reported in 13 Minn. Rep., 347–8 and 362–3, shows that the questions which they decided relate solely to the construction of State Statutes and those clauses of the State Constitution quoted in the Defendant's points.

Referring to the challenge to the panel of the Grand Jury, the Court say: "It is not necessary to consider separately the grounds of this challenge, for a challenge to the panel of the Grand Jury can be allowed only for one or more of the causes mentioned in the Statute; this challenge not being for any such cause, was therefore properly disallowed. Gen'l Stat., page 637, Sec. 14.

"Neither this, nor any other provision of our Statute gives any support, we think, to the proposition that a challenge for other causes may be interposed to a jury summoned on a special venire."

In regard to the consitutional questions, the Court say: "The first is, that the law (of 1867) is in conflict with Section 6, Article 1, of the State Constitution, which reads as follows: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law,' &c.

"We are unable here to discover any conflict. The law does not change the district, but merely the place of trial in the district—which is not forbidden. Before its passage, jurors, for the trial of crimes committed in Brown County, were chosen from that county, and the counties attached thereto for judicial purposes. (Comp. Stat., page 143, Sec. 29; ib, page 154, Sec. 7; Gen. Stat., page 117, Sec. 98,)—the same district from which they are now chosen. The Defendant, therefore, under this law, had a jury of the district in which the crime was committed, which district was previously ascertained by law."

Speaking of Defendant's objection, that the act of 1867 is an ex post facto law, the Court say: "We think the point untenable. Brown County and the counties attached thereto for judicial purposes, constituted a single trial district, and a law changing the place of trial from one point in the district to another, cannot, in principle, be distinguished from a law changing the place of trial from one point to another in the same county. Such a law neither directly nor indirectly aggravates or changes either the crime or the punishment, nor does it alter the rules of evidence, or receive less or different testimony than was required at the time of the commission of the offense, in order to convict the offender. It does not fall within any class of legislation forbidden by the clause of the Constitution referred to."

In the exercise of its appellate powers under the Judiciary Act of 1789, this Court has no authority on a writ of error from a State Court to declare a State law void on account of its collision with the State Constitution, nor can it review or revise the decision of a State Court in a controversy where no right is claimed under the Constitution of the United States, but which concerns alone a right claimed under a State Constitution, and dependant wholly for its existence upon the validity or interpretation of State laws. Such is the character of the case at bar. The right which Defendant claims he has been deprived of, to wit: The right to be indicted in the county where he committed the offence, is a right which he claims under the Constitution and Laws of Minnesota, in existence when he committed the crime. The highest judicial tribunal of that State has decided, in its construction of those laws, that no such right existed, and its decision is not only correct, but final and conclusive.

Jackson vs. Lampbid, 3 *Peters*, 280. 11 *Peters*, 167. 5 *How.*, 317.

Congdon et al., and Tenn. Min'g Co. vs. Goodman & Bledsoe, 2 *Black*, 574.

POINT II.

In case the Court come to the conclusion that the question whether chapter 112, General Laws of the State of Minnesota, is repugnant to the clause of the United States Constitution, prohibiting the passage of ex post facto laws, appears from the record to have been raised and decided in the State Supreme Court in such a manner as to give this Court jurisdiction,—then it is submitted that such law falls within none of the definitions of an ex post facto law. "It imposes no punishment for an act which was not punishable at the time it was committed, nor any additional punishment to that then prescribed; nor does it change any rule of evidence." This prohibitory clause of the Constitution relates to crimes and punishments, and not to criminal proceedings. If neither prohibits the creation of a new tribunal for the trial of past offences, nor the enlargement of an old one for the same purpose, nor any law relating to and regulating solely its organization, practice, and proceedings.

Webster vs. The Commonwealth, 16 *B. Monroe*, 16-40.

Commonwealth vs. Phillips, 11. *Pick*, 28. 4, *Wallace*, 325-6.

The law in question is one of this character. It prescribes a title for the District Court in those cases where one or more counties are attached to another for judicial purposes, but in no

wise alters its jurisdiction, territorial or otherwise. Its provisions, regulating the manner of obtaining juries, both grand and petit, prejudiced no right then secured to Defendant, and protected by the State Constitution. At the time his offence was committed it was indictable by a grand jury taken from the body of the electors of Brown, Cottonwood, Murray, Pipestone and Redwood counties (the last four of which were then attached to Brown for judicial purposes—Rev. Stat. Minn., p. 418, sec. 33;) and was triable by a petit jury, to be taken from the same body (Title 3, chap. 8, sec. 98, Genl. Stats. Minn.; 13 Minn. Rep. 344.) The act only provides, in this respect, a more sure and efficient mode of obtaining such juries. The Defendant claims that under the Constitution and laws of Minnesota, in force when he committed the crime, he had the right to be indicted and tried in Brown County, and therefore that the fourth section of the act in question, authorizing a change in the place of holding such court to another county in the same district, was in violation of such right. The highest Court in that State, in construing those laws, holds that he had no such right under them; that his only right was that of a jury trial in the trial district where he committed the offence, and then in existence, and that the said act in no way interfered with such district or right. And clearly an act authorizing a court to change the place of holding its terms within a district is no more objectionable than changing a county seat.

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